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1362

United States / 362

# Circuit Court of Appeals

For the Ninth Circuit. /

PAUL LUND,

Appellant,

vs.

TOWN OF PETERSBURG, a Municipal Corpora-  
tion,

Appellee.

## Transcript of Record.

Upon Appeal from the United States District Court for the  
District of Alaska, Division Number One.

FILED  
SEP 17 1923  
F. D. MONKTON  
CLERK







**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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PAUL LUND,

Appellant,

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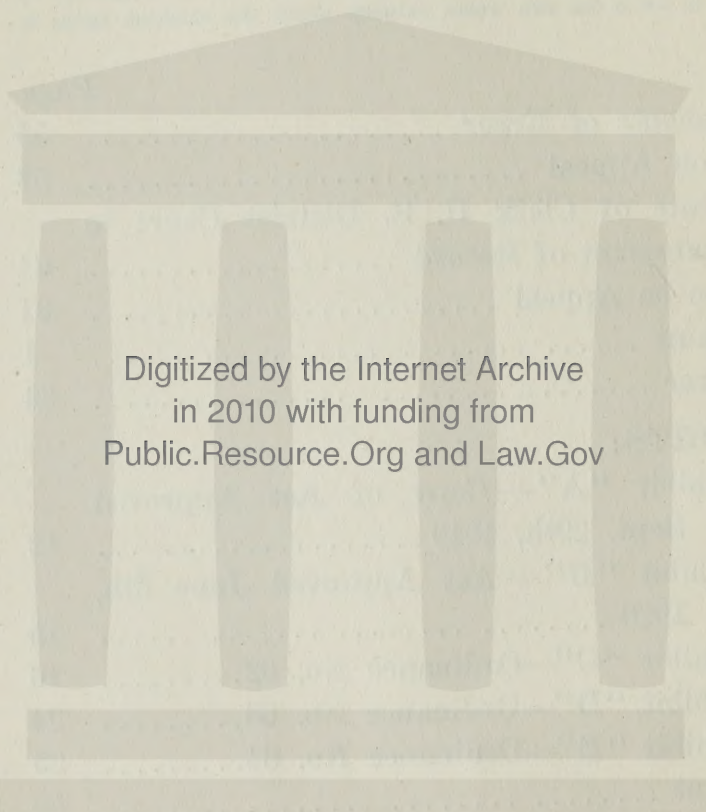
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**Names and Addresses of Attorneys of Record.**

H. L. FAULKNER, Esquire, Juneau, Alaska,  
Attorney for Plaintiff-Appellant.

HENRY RODEN, Esquire, Juneau, Alaska,  
Attorney for Defendant-Appellee.

In the District Court for the Territory of Alaska  
Division No. 1.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.

**Complaint.**

Comes now the plaintiff above named and for  
cause of action against the defendant alleges:

**I.**

That plaintiff is a citizen of the United States  
and a resident of the Town of Petersburg, Alaska,  
and the owner of real and personal property, lo-  
cated within the corporate limits of said town, which  
has been, is, and will continue to be assessed for the  
purpose of taxation by said town, and that said town  
has in the past, and hereafter will continue to levy  
general taxes against the property owned by plain-  
tiff, as aforesaid, for school and municipal purposes.

**II.**

That the defendant is a municipal corporation

located in Alaska and within that portion of Alaska over which the above-entitled Court has jurisdiction.

### III.

That the population of defendant town is approximately 1000, and that the total assessed valuation of all the taxable real and personal property in said town, according to the last assessment thereof for the purposes of taxation, is the sum of \$598,780.00. [1\*]

### IV.

That the Common Council of said town heretofore has established therein a school district and provided the same with a suitable schoolhouse, and is now maintaining within said town and school district public schools, and has heretofore and will hereafter levy taxes upon all the taxable property within said town for the purpose of maintaining such public schools.

### V.

That the Congress of the United States heretofore duly passed an act entitled, "An Act to authorize the incorporated Town of Petersburg, Alaska, to issue bonds in any sum, not exceeding \$75,000, for the purpose of constructing and installing a municipal electric light and power plant, and for the construction of a public school building," which act was duly approved on September 29, 1919, and thereupon became effective. (A copy of said act is hereto attached marked Exhibit "A" and by this reference made a part of this complaint). That

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\*Page-number appearing at foot of page of original certified Transcript of Record.



thereafter the Congress of the United States passed an act entitled, "An Act to amend an Act entitled 'An Act to authorize the incorporated Town of Petersburg, Alaska, to issue bonds in any sum not exceeding \$75,000 for the purpose of constructing and installing a municipal electric light and power plant and for the construction of a public school building,' approved September 29, 1919," which last mentioned act was duly approved June 5, 1920, (copy of which is hereto attached marked Exhibit "B" and by this reference made a part of this complaint). That said last mentioned act amended Section 1 and Section 5 of the first mentioned act, and that said first act of Congress, as amended by said second act of Congress, is now in full force and effect.

## VI.

That on the 19th day of March, 1923, the Common Council of defendant town did pass a certain ordinance, designated Ordinance No. 62 and entitled "An ordinance providing for a special election to be held in the Town of Petersburg, Alaska, a municipal corporation, to determine whether or not the said Town of Petersburg shall, (a) Issue its bonds [2] in the sum of approximately Thirty-five Thousand Dollars for the purpose of constructing and equipping a public school building; and (b) issue its bonds in the sum of approximately One Hundred Fifteen Thousand Dollars for the purpose of constructing and installing a municipal electric light and power plant, or for either of said purposes," which ordinance was immediately following its passage, and on the day of its passage, duly ap-

proved by the Mayor of said town; that a copy of said ordinance is hereto attached as Exhibit "C" and by this reference made a part hereof.

## VII.

That under and pursuant to the provisions of said Ordinance No. 62, a special election was held in said town on Monday, April 30, 1923, at which election there was submitted to the qualified electors of said town for their approval or rejection the following questions or propositions:

A. Whether or not the Incorporated Town of Petersburg shall issue bonds in any sum, not exceeding thirty five thousand dollars, for the purpose of constructing and equipping Public School Building within the corporate limits of said town;

B. Whether or not the Incorporated Town of Petersburg shall issue bonds in any sum, not exceeding one hundred fifteen thousand dollars, for the purpose of constructing and installing a Municipal Electric Light and Power Plant.

that more than a majority of the qualified voters of said town, voting at said election upon each of said propositions, did vote in favor of each of said propositions.

## VIII.

That by virtue of said acts of Congress, said Ord. No. 62 of said town, and by virtue of the votes cast at said election as aforesaid, said town now claims to be vested with full power, right and authority to become indebted, and to issue, sell and deliver its

general negotiable coupon bonds in the sum of \$35,000.00 for the purpose of constructing and equipping a [3] public school building therein and its general negotiable coupon bonds in the sum of \$115,000 for the purpose of constructing and installing a municipal electric light and power plant, as hereinafter set forth.

### IX.

That by Sec. 7 of said Ord. No. 62, as amended by Ord. No. 63 of said town, passed and approved June 18, 1923, (a copy of which Ord. No. 63 is hereto attached as Exhibit "D" and by this reference made a part of this complaint), it is provided that said \$150,000 bonds shall bear interest at the rate of 7% per annum, payable semi-annually, shall be in denominations of \$500 or \$1000, or both, and shall mature as follows: \$5,000 on the first day of July in each year, commencing July 1, 1928, to July 1, 1942, both inclusive, and \$75,000 on the 1st day of July, 1943, and shall be payable, both principal and interest, at the office of the Guaranty Trust Company in New York City.

### X.

That on the 18th day of June, 1923, the Common Council of said town did pass a certain ordinance known as Ordinance No. 64 entitled, "An ordinance providing for the issuance, sale, maturity and redemption of Municipal Electric Light and Power Bonds, in a sum not exceeding one hundred and fifteen thousand dollars, to be issued and sold for the purpose of constructing and installing a Municipal Electric Light and Power Plant," which ordinance



was on the day of its passage duly approved by the Mayor of said town; that a copy of said Ord. No. 64 is hereto attached as Exhibit "E" and by this reference made a part of this complaint. [4]

### XI.

That by said Ord. No. 64 it is provided that said \$115,000 "Municipal Electric Light and Power Plant Bonds" shall be sold to Hubbell & Waller, a copartnership, at par and accrued interest, and shall be delivered from time to time as funds are required for the construction, erection, installation and equipment of said electric light and power plant; that said ordinance further provides that said \$115,000 bonds shall be in denominations of \$1,000 each, numbered consecutively from 1 to 115, both inclusive, shall be dated July 1, 1923, shall bear interest at the rate of 7% per annum, payable semi-annually, shall mature in the order of their numbers, lowest first, as follows: \$5,000 on July 1st of each of the years 1928 to 1942, inclusive, and \$40,000 on July 1, 1943, and shall be payable, both principal and interest at the office of the Guaranty Trust Company in New York City.

### XII.

That by Sec. 7 of said Ord. No. 64 it is provided:

"That the said Town of Petersburg does hereby create and establish a sinking fund for the purpose of the payment of the principal of said bonds and the interest thereon as they mature and accrue; that the said Town of Petersburg shall annually levy and tax upon all the real and personal property situate within

the corporate limits of said town, subject to taxation, in amount sufficient to pay the interest and installments of principal due for the ensuing year, and such amounts as may be required for the payment of such interest and installments shall be kept and remain in said sinking fund and shall be used and applied to the payment of such interest and installments, and no part of such sinking fund shall be applied to any other purpose whatsoever.

### XIII.

That said town, as part of said Municipal Electric Light and Power Plant, proposes to and will construct a power house on lands to be acquired by it at a distance of approximately fifteen miles outside the corporate limits of said town, and to transmit the electric energy generated at said power plant by transmission [5] lines to be constructed by it over rights of way to be acquired by it between said power-house and said town and wholly outside the corporate limits of said town; that said town proposes to and will sell a substantial portion of the power generated at and by said power plant to various private persons, firms and corporations for consumption and use outside the corporate limits of said town.

### XIV.

That said town is not vested by law or otherwise with power or authority to acquire property located outside its corporate limits for the purpose of constructing a municipal electric light and power plant, and is not authorized by law or otherwise

to expend moneys derived from the sale of said \$115,000 Municipal Light & Power Plant Bonds for the purpose of acquiring any property outside its corporate limits for such use, or for constructing and equipping outside of its corporate limits any power plant, transmission lines, or any other structures, buildings, machinery and equipment to be used in connection therewith.

#### XV.

That said town is not authorized by law or otherwise to expend any of the moneys to be derived from the sale of said \$115,000 Municipal Electric Light & Power Plant Bonds for the purpose of constructing a municipal electric light and power plant or system to generate electric energy to be sold, consumed and used outside of the corporate limits of said town.

#### XVI.

That the corporate authorities of said town have no power or authority to assess, levy or collect for school and all other municipal purposes any annual tax in excess of two per centum of the assessed valuation upon all real and personal [6] property within said town.

#### XVII.

That if said bonds be issued by said town, as aforesaid, it will be necessary for said town, in order to maintain its corporate existence and perform its functions, and to maintain its public schools and to pay the principal and interest of said bonds as the same become due, to annually levy a tax upon all the taxable real and personal property in said



town in excess of the two per centum of the assessed valuation thereof, and the Common Council of said town has unlawfully and without right or authority by the provisions of said Ord. No. 62 of said town irrevocably bound and obligated said town to levy and collect such excess taxes.

### XVIII.

That by said Ord. No. 64, said \$115,000 Municipal Electric Light & Power Plant Bonds have been made to mature serially in fixed annual amounts as follows: \$5,000 on July 1, of each of the years 1928 to 1942, inclusive, and \$40,000 on July 1, 1943, whereas said acts of Congress provided that said bonds shall mature twenty years from their date, with option reserved to said town to redeem the same prior to maturity in numerical order at the rate of \$5,000 per annum from and after the expiration of five years from date of bonds; that no authority exists by virtue of law or otherwise empowering said town or its Common Council to make said bonds mature serially in fixed amounts, as aforesaid, or to make said bonds mature in any manner other than that specifically stated in said acts of Congress. [7]

### XIX.

That said Town of Petersburg has sold and is now about to issue and deliver the \$35,000.00 general bonds of said town authorized by the aforesaid special election to be issued for the purpose of constructing and equipping a public school building within the corporate limits of said town, and that said town has bound and obligated itself to levy

annually a tax upon all the taxable real and personal property in said town sufficient to pay the principal and interest of said school bonds as the same fall due.

## XX.

That during the year ending March 15, 1923, the total receipts of said town from all sources amounted to the sum of \$33,323.53, which sum included general *general* taxes levied by said town in the sum of \$10,812.88, moneys received from the existing municipal light plant in the sum of \$9,452.19, license moneys in the sum of \$4,795.68, receipts from the water department in the sum of \$3,689.00 and other moneys received from municipal court fines, auto licenses, dog taxes, street and sewer assessments, and the operation of the city hospital; that during said year the total disbursements of said town amounted to \$29,903.56, including disbursements made for the operation of its existing municipal light plant, and water plant, the maintenance and operation of its city hospital, schools and fire department, the maintenance of streets, walks and sewers, the conduct of elections, the salaries of town officers and other miscellaneous expenses.

## XXI.

That said town, its Common Council and its officers and agents threaten to, and will, unless enjoined from so doing by this Court: [8]

(a) Issue, sell and deliver said \$115,000 bonds, dated July 1, 1923, bearing 7% interest per annum, payable semi-annually, and maturing as follows:

\$5,000 on July 1st of each year of the years 1928 to 1942, both inclusive, and \$40,000 on July 1, 1943.

(b) Use the proceeds derived from the sale of said bonds to acquire real and personal property outside of its corporate limits for the construction of a municipal electric light and power plant, and will use such proceeds to construct a power plant and transmission lines outside of its corporate limits and to equip the same with all necessary machinery and appurtenances.

(c) Will sell to private individuals, firms and corporations electric energy generated by said power plant to be used and consumed outside the corporate limits of said town.

(d) Will issue, sell and deliver said \$115,000 bonds and thereby obligate said town and its Common Council and officers to levy and collect annually general taxes upon all the taxable real and personal property in said town (including the real and personal property of plaintiff) in excess of two per centum of the assessed valuation thereof.

(e) Will incur a municipal indebtedness by the issuance of said bonds in excess of any authority conferred upon it by law and will, in order to provide for the payment of the principal and interest of said bonds, annually levy general taxes upon all the taxable real and personal property in said town, including the real and personal property of plaintiff, in excess of the limitation upon municipal tax levies prescribed by law. [9]

XX.

That if said town and its Common Council and



municipal officers issue, sell and deliver said bonds, as aforesaid, plaintiff will suffer irreparable loss, damage and injury, and that plaintiff is without any speedy or adequate remedy at law.

WHEREFORE, plaintiff prays that defendant town and its Common Council and its municipal officers be permanently enjoined from issuing all or any part of said bonds, and that plaintiff may have such other relief as in the premises plaintiff is entitled to receive.

H. L. FAULKNER,  
Attorney for Plaintiff.

The United States of America,  
Territory of Alaska,—ss.

Paul Lund, being first duly sworn, on oath deposes and says: I am the plaintiff in the above and foregoing entitled action; that I have read the foregoing complaint and the same is true as I verily believe.

PAUL LUND.

Subscribed and sworn to before me this 11th day of August, 1923.

[Notarial Seal] HAROLD F. DAWES,  
Notary Public, Territory of Alaska.  
My commission expires July 2, 1927. [10]

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**Exhibit "A."**

Copy of Act approved Sept. 29th, 1919.

An act to authorize the incorporated Town of Petersburg, Alaska, to issue bonds in any sum not

exceeding \$75,000.00 for the purpose of constructing and installing a municipal electric light and power plant and for the construction of a public school building.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

Sec. 1. That the incorporated Town of Petersburg, Alaska, is hereby authorized and empowered to issue bonds in any sum not exceeding \$75,000.00 for the purpose of constructing and installing a municipal electric light and power plant and for the construction of a public school building.

Sec. 2. That before such bonds shall be issued a special election shall be ordered by the Common Council of the Town of Petersburg at which election the question of whether such bonds shall be issued shall be submitted to the qualified electors of said Town of Petersburg whose names appear on the last assessment-roll of said town for municipal taxation. Thirty days notice of such election shall be given thereof in a newspaper printed and published and of general circulation in said town before the date fixed for such election.

Sec. 3. That the registration for such election and the manner of conducting the same and the canvass of the returns of said election shall be, as near as practicable, in accordance with the requirements of law in general or special elections in said municipality, and said bonds shall be issued only upon condition that a majority of the votes cast at

such election in said town shall be in favor of issuing such bonds.

Sec. 4. That the bonds above specified, when authorized to be issued as hereinbefore provided, shall bear interest at a rate to be fixed by the Common Council of Petersburg not to exceed seven per centum per annum, payable semi-annually and shall not be sold for less than their par value with accrued interest and shall be in denominations not exceeding \$1,000.00 each, the principal to be due in twenty years from date thereof, and provided further, that the Common Council of the town may reserve the right to pay off said bonds in their numerical order at the rate of \$5,000.00 thereof per annum from and after the expiration of five years from their date. Principal and interest shall be payable in lawful money of the United States of America at the office of the town treasurer or at such bank in the City of New York, State of New York, or such place as may be designated by the Common Council of the Town of Petersburg, the place of payment to be mentioned in the bonds, provided further that each and every of such bonds shall bear the written signature of the Mayor and Clerk of said Town of Petersburg and also bear the seal of said town.

Sec. 5. That no part of the funds arising from the sale of said bonds shall be used for any purpose other than specified in this Act and such bonds shall be sold only when and in such amounts as the Common Council shall direct and the proceeds thereof shall be disbursed for the purposes hereinbefore



mentioned and under the order and direction of the said common council from time to time [11] as the same may be required for said purposes provided that not to exceed \$50,000.00 from the proceeds of the sale of said bonds shall be expended for the construction and installation of the electric light and power plant and not to exceed \$25,000.00 thereof shall be expended in the construction of the public school building.

Approved Sept. 29, 1919. [12]

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### **Exhibit "B."**

Act approved June 5th, 1920.

An act to amend an act entitled "an Act to authorize the incorporated Town of Petersburg, Alaska, to issue bonds in any sum not exceeding \$75,000.00 for the purpose of constructing and installing a municipal electric light and power plant and for the construction of a public school building," approved September 29, 1919.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that section 1 of the act entitled "an Act to authorize~~d~~ the incorporated Town of Petersburg, Alaska, to issue bonds in any sum not exceeding \$75,000.00 for the purpose of constructing and installing a municipal electric light and power plant and for the construction of a public school building" be, and the same is hereby, amended to read as follows:

“Section 1. That the incorporated Town of Petersburg, Alaska, is hereby authorized and empowered to issue bonds in any sum not exceeding \$150,000.00 for the purpose of constructing and installing a municipal electric light and power plant and for the construction of a public school building.”

Sec. 2. That section 5 of the Act mentioned in the preceding section is hereby amended to read as follows:

“Section 5. That no part of the funds arising from the sale of said bonds shall be used for any purpose other than specified in this Act. Said bonds shall be sold only in such amounts as the common council shall direct, and the proceeds thereof shall be disbursed for the purposes hereinbefore mentioned and under the order and direction of said common council from time to time as the same may be required for said purposes; Provided, That not to exceed \$115,000.00 of the proceeds of the sale of said bonds shall be expended for the construction and installation of the electric light and power plant, and not to exceed \$35,000.00 thereof shall be expended for the construction of the public school building.”

Approved June 5, 1920. [13]

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**Exhibit “C.”**

**ORDINANCE No. 62.**

An Ordinance Providing for a Special Election to be Held in the Town of Petersburg, Alaska, a

Municipal Corporation, to determine whether or not the said Town of Petersburg Shall, (a) Issue its Bonds in the Sum of Approximately Thirty-five Thousand Dollars for the Purpose of Constructing and Equipping a public School Building; and (b) Issue its Bonds in the Sum of Approximately One Hundred Fifteen Thousand Dollars for the Purpose of Constructing and Installing a Municipal Electric Light & Power Plant, or for Either of Said Purposes:

\* \* \* \* \*

Whereas, the Town of Petersburg, Alaska, a Municipal Corporation in the Territory of Alaska, desires to construct and equip a Public School Building within its corporate limits, for the use of the said Municipality and its inhabitants, at an estimated total cost of approximately Thirty-five Thousand Dollars; and,

Whereas, The said Town of Petersburg desires and proposes to construct and install a Municipal Electric Light & Power Plant, to supply its inhabitants with light and power, at a cost of not to exceed One Hundred Fifteen Thousand Dollars; and,

Whereas, The said Town of Petersburg, a Municipal Corporation, desires to pay for the construction and equipment of the said Public School Building and for the Construction and Installation of said Municipal Electric Light & Power Plant by the issuance of General Bonds in the sum of Thirty-five Thousand Dollars and of One Hundred Fifteen Thousand Dollars, respectively, which said



bonds shall mature twenty years from the date thereof and shall bear interest at the rate of seven (7%) per cent per annum, payable semi-annually, on the fifteenth day of March and on the fifteenth day of September, in each year, both principal and interest payable at the office of the Municipal Treasurer of the Town of Petersburg, in the Town of Petersburg, Alaska; the right to call in and pay off the said bonds in their numerical order at the rate of five thousand dollars thereof per annum from and after the expiration of three years from their date, being especially reserved; and [14]

Whereas, by virtue of an Act of Congress approved September 29th, 1919, entitled "An Act to authorize the incorporated Town of Petersburg, Alaska, to Issue Bonds in any Sum not Exceeding Seventy-five Thousand Dollars for the Purpose of Constructing and Installing a Municipal Electric Light & Power Plant, and for the Construction of a Public School Building," as amended by an Act of Congress, approved June 5th, 1920, entitled, "An Act to Amend an Act Entitled, 'An Act to Authorize the Incorporated Town of Petersburg, Alaska, to Issue Bonds in any Sum not Exceeding \$75,000.00 for the Purpose of Constructing and Installing a Municipal Electric Light & Power Plant and for the Construction of a Public School Building,'" THE SAID MUNICIPAL CORPORATION IS AUTHORIZED TO ISSUE THE SAID BONDS, provided that such issuance be approved by a majority of the electors residing

within the corporate limits of the said town, at a special election to be held for such purpose, as provided in said Act as amended;

Now, therefore; BE IT ORDAINED BY THE COMMON COUNCIL OF THE TOWN OF PETERSBURG:

1st. That a Special Election be held in the Town of Petersburg, Alaska, on Monday, the 30th day of April, 1923, between the hours of 8:00 A. M. and 7:00 P. M. of said day, at which said election all the qualified electors of the incorporated Town of Petersburg, Alaska, are invited to vote on the following two questions, or propositions, to wit:

A. Whether or not the Incorporated Town of Petersburg shall issue bonds in any sum, not exceeding thirty-five thousand dollars, for the purpose of constructing and equipping a Public School Building within the corporate limits of said town;

B. Whether or not the Incorporated Town of Petersburg shall issue bonds in any sum, not exceeding one hundred fifteen thousand dollars, for the purpose of constructing and installing a Municipal Electric Light & Power Plant.

2d. That the manner of conducting and holding said election, the registration of voters, and the canvass of the returns shall, as nearly as practicable, be in accordance with the provisions of the [15] election ordinance now in force and effect within the corporate limits of the said Town of Petersburg; that all the territory embraced within

the corporate limits of the said Town of Petersburg shall constitute one voting precinct; and that the polling place in the said voting precinct shall be in the City Hall, also known as the "Fire Hall," situated within the said corporate limits.

3d. That the Municipal Clerk of the said Town of Petersburg, be, and he hereby is, empowered to issue and post a public notice in three public places within the corporate limits of the said town, and that he cause said notice to be printed and published in the Petersburg Weekly Report, a newspaper printed and published and of general circulation in the said town, and that said notice be posted and published, as aforesaid, at least thirty days prior to the date of said election; that the said notice shall be, substantially, in the following form:

#### NOTICE OF SPECIAL ELECTION.

To the Electors of the Town of Petersburg a Municipal Corporation:

Notice is hereby Given, that pursuant to an Act of Congress, entitled, "An Act to Authorize the Incorporated Town of Petersburg, Alaska, to Issue Bonds in Any Sum, not exceeding \$75,000, for the Purpose of Constructing and Installing a Municipal Electric Light and Power Plant, and for the Construction of a Public School Building," approved September 29, 1919, as amended by an Act of Congress entitled, "An Act to Amend an Act entitled, 'An Act to authorize the Incorporated Town of Petersburg, Alaska, to issue bonds in any sum not exceeding \$75,000 for the purpose of con-



structing and installing a Municipal Electric Light and Power Plant and for the construction of a Public School Building,' approved September 29, 1919," and Ordinance No. 61, passed by the Common Council of the Town of Petersburg, Alaska, a Municipal Corporation, at its regular meeting held on the 19th day of March, 1923, a SPECIAL ELECTION will be held in the said Town of Petersburg, Alaska, on the 30th day of April, 1923, [16] between the hours of 8:00 A. M. and 7:00 P. M. of said day, at which election the electors of and in the said incorporated Town of Petersburg are invited to vote on the two following questions or propositions, to wit:

(A) Whether or not the Incorporated Town of Petersburg shall issue bonds in any sum, not exceeding thirty-five thousand dollars, for the purpose of constructing and equipping a Public School Building within the Corporate Limits of said Town;

(B) Whether or not the Incorporated Town of Petersburg shall issue bonds in any sum, not exceeding a hundred fifteen thousand dollars, for the purpose of constructing and installing a Municipal Electric Light & Power Plant.

That the entire area embraced within the corporate limits of the said Town of Petersburg shall constitute one voting precinct, and that the polling place shall be in that certain public building known as the "City Hall" or "Fire Hall," in the said Town of Petersburg. All persons who are citizens of the United States, twenty-one years of

age or over, who have been residents of Alaska for the period of one year and of the Town of Petersburg for six months immediately preceding the date of said election, who have duly registered as provided by the Ordinance of the Town of Petersburg, and whose names appear on the last Assessment Roll of the said Town for Municipal Taxation are qualified to vote at said election.

Dated this 19th day of March, 1923.

TOWN OF PETERSBURG,

By Its Common Council.

ED. LOCKEN,

Mayor.

HAROLD F. DAWES,

Clerk.

4th. That the Municipal Clerk shall cause the necessary ballots to be prepared and delivered to the Judge of Election selected and appointed by the Common Council as provided in the election ordinance now in force in the said Town of Petersburg; and he shall [17] before the commencement of the said election, file in his office due and lawful proof of the posting of the Notice of Special Election heretofore referred to, and also due proof of the publication of said notice in said newspaper; such proof to be made by the person posting said notices, and the publisher of the said newspaper, respectively.

5th. The Judges of Election, under their hands and seals shall canvass the returns and prepare their return; and in such return they shall state the number of votes cast for or against each pro-

position separately; such return shall be duly filed with the Municipal Clerk, and by him shall be filed and kept among the permanent records of the Town.

6th. That if a majority of the qualified voters of the said town of Petersburg, at the said election, shall declare that they are in favor of the issuance of such bonds for either or both of said propositions, thus submitted to them for their determination, the Common Council of the Town of Petersburg shall formulate plans and make arrangements for the sale of such bonds the issuance of which has been decided upon at the said election.

7th. That the bonds above specified shall bear interest at the rate of seven per cent (7%) per annum, payable semi-annually, and shall not be sold for less than their par value with accrued interest, and shall be in denominations not exceeding \$1,000.00 each, the principal to be due in twenty years from and after the date thereof; provided, however, that the Common Council of the Town of Petersburg reserves the right to pay off such bonds in their numerical order at the rate of \$5,000.00 thereof per annum, from and after the expiration of five years from their date. Principal and interest shall be payable in lawful money of the United States of America, at the office of the Town Treasurer of the Town of Petersburg, at Petersburg, Alaska; and, provided [18] further that each and every bond shall have the signature of the Mayor and Clerk of the said Town of Petersburg, and shall also bear the seal of the said Town.



8th. That the funds arising from the sale of the said bonds shall be used for the purpose specified herein and for no others; all in conformity with the provisions of the Acts of Congress approved September 29th, 1919, and June 5th, 1920, respectively.

An emergency is hereby declared to exist, and this Ordinance shall be in full force and effect from and after its passage and approval.

THE COMMON COUNCIL OF PETERSBURG.

[Seal] By ED. LOCKEN,  
President of the Common Council and Mayor of  
Petersburg, Alaska.

Passed and approved this 19th day of March, 1923.

Attest:

HAROLD F. DAWES,  
Municipal Clerk. [19]

### **Exhibit "D."**

#### **Ordinance No. 63.**

An ordinance to amend section seven (7) of ordinance No. 62.

BE IT ORDAINED BY THE COMMON COUNCIL OF THE TOWN OF PETERSBURG, ALASKA:

Section 1. That section seven (7) of ordinance No. 62 of the Town of Petersburg, be amended to read as follows:

Section 7. That the bonds above specified shall bear interest at the rate of seven per cent per annum, payable semi-annually, and shall not be sold

for less than their par value with accrued interest, and shall be in denominations of \$500.00 or \$1000.00 or both each; the said bonds shall mature as follows: \$5000.00 on the first day of July in each year, commencing July 1st, 1928, to July 1st, 1942, both inclusive; \$75,000.00 on the first day of July, 1943. Principal and interest shall be payable in lawful gold coin of the United States of America, of the present standard of fineness and weight, at the office of the Guaranty Trust Company, of New York City; and provided further that each of said bonds shall bear the signature of the Mayor and Municipal Clerk of said Town of Petersburg, and shall also bear the seal of the said town."

Section two. This ordinance to be in full force and effect from and after its passage and approval.

Passed and approved this 18th day of June, 1923.  
THE COMMON COUNCIL OF THE TOWN OF  
PETERSBURG, ALASKA.

By T. S. ELSEMORE,

Mayor of the Town of Petersburg.

Attest: [Seal] HAROLD F. DAWES,  
Municipal Clerk. [20]

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**Exhibit "E."**

**Ordinance No. 64.**

An ordinance providing for the issuance, sale, maturity, and redemption of Municipal Electric Light & Power Bonds, in a sum not exceeding one hundred and fifteen thousand dollars, to be issued

and self for the purpose of constructing and installing a Municipal Electric Light and Power Plant.

WHEREAS a call for a special election for the purpose of determining, among other things, whether or not the Town of Petersburg, in the Territory of Alaska, a municipal corporation, should issue its bonds in a sum not exceeding one hundred and fifteen thousand dollars for the purpose of constructing and installing a Municipal Electric Light and Power Plant, was duly issued as provided by ordinance No. 62, adopted and approved by the Common Council of the Town of Petersburg, Alaska, on the 19th day of March, 1923; and

WHEREAS such call and notice of election was posted in three public places within the corporate limits of the said Town of Petersburg and was duly published in the "Petersburg Weekly Report," a newspaper published at and of general circulation in said Town of Petersburg, all as appears from an examination of the affidavits of posting and publishing duly filed in the office of the municipal clerk; and

WHEREAS pursuant to said call and notice an election was duly held and had in accordance therewith, and the Judges and Clerks of election having made and filed their minutes and return of said election, from an examination of which it appears that at said special election there were cast seventy-two (72) votes upon the proposition as to whether or not the Town of Petersburg shall issue bonds in the sum of approximately and not exceeding one



hundred and fifteen thousand dollars for the construction and installation of a Municipal Electric Light and Power Plant; that seventy-one (71) votes were cast in favor of the proposition and one (1) vote was cast against the said proposition, all of which has been duly considered by the Common Council of the Town of Petersburg:

NOW THEREFORE BE IT ORDAINED BY THE COMMON COUNCIL OF THE TOWN OF PETERSBURG:

1st. [21] 1. That a bonded indebtedness of the Town of Petersburg be, and the same is hereby, declared, authorized and created, to the amount of \$115,000.00, for the purpose of providing funds and money for the erection, construction, installation and equipment of an Electric Light & Power Plant at and near Petersburg, Alaska.

2. That the said bonded indebtedness hereby authorized and created shall be represented by one hundred and fifteen bonds of the said Town of Petersburg, Alaska, in denominations of \$1,000.00 or \$500.00 as the case may be each, bearing date the first day of July, 1923; that the said bonds shall bear interest at the rate of 7% per cent annum from their date until paid, payable semi-annually, and shall have appropriate coupons attached for each interest payment; that both the principal and interest shall be payable in United States Gold Coin of present standard of weight and fineness; that the said bonds shall be numbered from one (1) to one hundred fifteen (115) or one (1) to two hundred thirty (230) as the case may be, both in-

clusive, for said aggregate principal sum of \$115,000.00; that said bonds shall mature as follows:

\$5,000.00 each year, July 1st, 1928 to 1942 (inclusive);

\$40,000.00 each year, July 1st, 1943;

said bonds to be retired and paid off in their numerical order, at par and accrued interest to date of retirement.

3. The retirement and redemption of said bonds shall be made as follows: The said Town of Petersburg shall advertise at least once a week for four successive calendar weeks, in a newspaper published either at Petersburg or Juneau, Alaska, a notice addressed to the holders of bonds to be paid off and retired (but said town shall not be required to state in said notice the individual name of each person or corporation holding such bonds or any of them) specifying the distinctive numbers of the bonds to be paid off and retired, and stating that on a date specified in such notice the said specified [22] bonds will become and will be due and payable at par with interest accrued to the date of payment specified in such notice.

That if any holder of any bond thus to be paid off and retired, after such notice has been given, shall fail or neglect to present any bond in such notice specified, such bond shall cease to bear interest.

That the said bonds shall be signed by the Mayor and the Municipal Clerk of the said Town of Petersburg, and the seal of said town shall be affixed thereto, and the interest coupons attached thereto

evidencing the interest to become due thereon, shall be signed by said Mayor and Municipal Clerk, or their facsimile signatures may be attached thereto.

4. That the said bonds shall be sold, negotiated and disposed of by the said Town of Petersburg, through its Common Council, to Messrs. Hubbell and Waller, a copartnership composed of C. S. Hubbell and H. H. Waller of Seattle, Washington, at par with accrued interest, from time to time as may be required, to raise funds and money for the construction, erection, installation and equipment of said Electric Light & Power Plant;

That no part of the funds arising from the sale of any of said bonds shall be used for any purpose other than the construction, erection, installation and equipment of said Electric Light & Power Plant, and only such amounts of said bonds shall be sold as the Common Council of said Town of Petersburg may from time to time direct.

5. That the forms of the bonds of the coupons to be attached thereto are to be severally and respectively, save and except as to the date of maturity therein specified, substantially as follows:  
[23]

No. ————— \$1000.00

UNITED STATES OF AMERICA.

Territory of Alaska.

Town of Petersburg.

Light & Power Bond of 1923.

KNOW ALL MEN BY THESE PRESENTS,  
That the Town of Petersburg, Territory of Alaska,  
a municipal corporation, duly organized and exist-



ing under and by virtue of the laws of the United States, acknowledges itself to owe, and for value received promises to pay to bearer the sum of One Thousand Dollars (\$1000.00) on the first day of July, 19—, together with interest thereon from date hereof until paid at the rate of seven (7%) per/cent per annum, payable semi-annually on the first days of January and July in each year, as evidenced by and upon presentation and surrender of the annexed interest coupons as they severally become due, both principal and interest payable in gold coin of the United States of America of present standard of weight and fineness at the office of The Guaranty Trust Company in the city of New York. For the prompt payment of this bond, both principal and interest, the full faith, credit and resources of said town are hereby irrevocably pledged.

This bond is a part of an issue of bonds in the principal sum of One Hundred *Fifteen* (\$115,000.00) Dollars, all of said bonds being of like tenor, amount, date and effect, except as to the times of maturity, which are as follows:

Bonds Nos. 1 to 5 (inclusive),	July 1, 1928,
Bonds Nos. 6 to 10	“ July 1, 1929,
Bonds Nos. 11 to 15	“ July 1, 1930,
Bonds Nos. 16 to 20	“ July 1, 1931,
Bonds Nos. 21 to 25	“ July 1, 1932,
Bonds Nos. 26 to 30	“ July 1, 1933,
Bonds Nos. 31 to 35	“ July 1, 1934,
[24]	
Bonds Nos. 36 to 40, (inclusive),	July 1, 1935,
Bonds Nos. 41 to 45	“ July 1, 1936,
Bonds Nos. 46 to 50	“ July 1, 1937,

Bonds Nos. 51 to 55	“	July 1, 1938,
Bonds Nos. 56 to 60	“	July 1, 1939,
Bonds Nos. 61 to 65	“	July 1, 1940,
Bonds Nos. 66 to 70	“	July 1, 1941,
Bonds Nos. 71 to 75	“	July 1, 1942,
Bonds Nos. 76 to 115	“	July 1, 1943,

Which said bonds are to be used for a strictly municipal purpose, to wit, the construction, erection, installation and equipment of a municipal electric light and power plant in the said Town of Petersburg, Alaska, all as provided by the Act of Congress approved September 29, 1919, as amended by the Act of Congress approved June 5, 1920, authorizing the issuance of said bonds for the purpose of constructing, erecting, installing and equipping said Municipal Electric Light & Power Plant, and as provided by Ordinance No. 62 of said town, passed and approved March 19, 1923, and this bond is issued pursuant to and in full compliance with the Laws of the United States and the Territory of Alaska, and of the Ordinance and resolutions of the said Town of Petersburg.

It is hereby recited, certified and declared that all Acts, Conditions and Things required by the Laws of the United States and of the Territory of Alaska, and of the Ordinances of said Town of Petersburg to exist and be done precedent to and in the issuance of this bond have existed and been done in due regular form, time and manner, as required by the law, and that the entire indebtedness of said town, including this bond, does not exceed any limitation prescribed by the laws of the United States or the Territory of Alaska.

IN WITNESS WHEREOF, The Town of Petersburg, Alaska, has [25] caused this bond to be signed by its Mayor and attested by its Municipal Clerk, and has caused its corporate seal to be hereto affixed and the interest coupons attached to be signed and sealed with the fac-simile signatures of said officers and the seal of said Town, this 1st day of July, 1923.

TOWN OF PETERSBURG, ALASKA.

By \_\_\_\_\_,

Its Mayor.

Attest:

\_\_\_\_\_,

Its Municipal Clerk.

No. —.

\$35.00

### INTEREST COUPON.

On the first day of —, 19—, the Town of Petersburg, Alaska, will pay to bearer, at the office of Guaranty Trust Company, in the City of New York, the sum of Thirty-five (\$35.00) Dollars, in gold coin of the United States of America, such sum being the semi-annual interest due on that date on its general Electric Light & Power Bond dated July 1st, 1923, No. —.

TOWN OF PETERSBURG, ALASKA.

By \_\_\_\_\_,

Its Mayor.

Attest:

\_\_\_\_\_,

Its Municipal Clerk. [26]

6. That said Town of Petersburg does hereby appoint The Guaranty Trust Company, of the City

7. That the said Town of Petersburg does hereby create and establish a sinking fund for the purpose of the payment of the principal of said bonds and the interest thereon as they mature and accrue; that the said Town of Petersburg shall annually levy a tax upon all the real and personal property situate within the corporate limits of the said town, subject to taxation, in amount sufficient to pay the interest and installments of principal due for the ensuing year, and such amounts as may be required for the payment of such interest and installments shall be kept and remain in said sinking fund and shall be used and applied to the payment of such interest and installments, and no part of such sinking fund shall be applied to any other purpose whatsoever.

Passed and approved this 18th day of *Junem*  
1923.

By T. S. ELSEMORE,

Its Mayor.

Attest:        [Seal] HAROLD F. DAWES,  
                                Its Municipal Clerk.

Filed in the District Court Territory of Alaska,  
First Division. Aug. 15, 1923. John H. Dunn,  
Clerk. By N. B. Cook, Deputy. [27]



In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.

No. 2322—A.

PAUL LUND,

Plaintiff,

vs.

TOWN OF PETERSBURG, a Municipal Cor-  
poration,

Defendant.

**Demurrer.**

Comes now the defendant above-named and demurs to the complaint filed herein, and for cause of demurrer alleges that the said complaint does not state facts sufficient to constitute a cause of action.

HENRY RODEN,

Defendant's Attorney.

Received a copy of within demurrer this 25th day of August, 1923.

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Plaintiff's Attorney.

Filed in the District Court Territory of Alaska,  
First Division. Aug. 25, 1923. John H. Dunn,  
Clerk. By N. B. Cook, Deputy. [28]

In the United States District Court for the Territory of Alaska, First Division.

PAUL LUND,

Plaintiff,

vs.

TOWN OF PETERSBURG, a Municipal Corporation,

Defendant.

**Memorandum Opinion on Demurrer to the Complaint.**

By an Act of Congress entitled, "An Act to Authorize the Incorporated Town of Petersburg, Alaska, to issue bonds in any sum not exceeding \$75,000.00 for the purpose of constructing and installing a municipal electric light and power plant and for the construction of a public school building" approved September 29, 1919 (41 Stat. L. 289) and amended by an act increasing the authorization for the bond issue to \$150,000 approved September 5, 1920 (41 Stat. L. 981), the common council of the Town of Petersburg, with the assent of a majority of the qualified voters thereof, was authorized to issue bonds in the sum of \$115,000 for the construction and installation of an electric light and power plant, and bonds in the sum of \$35,000 for the construction of a schoolhouse.

Pursuant to the authority contained in said act, the common council of the town, the assent of the majority of the voters of the town, given at a

special election held for the purpose of submitting the question to the electors as provided in the act, having been obtained, on June 18, 1923, passed an ordinance (No. 64) providing for the issuance, sale, maturity and redemption of municipal electric light and power bonds in a sum [29] not exceeding \$115,000 to be issued and sold for the purpose of constructing and installing a municipal electric light and power plant for the city. This ordinance provided that the bonds be sold to Hubbell & Waller, a copartnership, at par and accrued interest, and delivered from time to time as required for the construction of the plant; in denominations of \$1,000 each, dated July 1, 1923, bearing interest at 7 per cent payable semi-annually and maturing in the order of their number, the lowest first; and that \$5,000 thereof should mature on July 1st of each of the years 1928 to 1942 inclusive, and \$40,000 on July 1st, 1943. It was further provided by the ordinance that a sinking fund be established for the purpose of the payment of the principal and interest on the bonds as they respectively accrue and that there be an annual tax levy upon the real and personal property within the corporate limits of the town for the payment of the principal and interest on the bonds as such principal and interest would annually accrue, the same to be paid and kept in the sinking fund and applied to such purpose and to no other purpose whatever.

On August 16, 1923, the plaintiff, alleging that he is a resident and taxpayer of the Town of Pe-

tersburg, brought this action to enjoin said town from the sale and disposal of the bonds so authorized, alleging the foregoing facts and further that the population of the town is approximately 1,000 and that the total assessed value of taxable real and personal property within the corporate limits as shown by the last assessment was \$598,780; that the said town proposes to and will construct its power-house and plant on lands to be acquired without the corporate limits of the town at a distance of fifteen miles therefrom and will transmit the electric power generated at such plant over rights of way to be acquired, to the town [30] by means of transmission lines; and that the town proposes to and will sell a substantial portion of the power generated at its power plant so to be constructed to various private persons for consumption and use outside the corporate limits of the town; that the town has sold and is about to deliver the \$35,000 bond issue authorized by the Act of Congress for the construction of the public school building and has obligated itself to levy an annual tax upon the taxable property in the town to pay the principal and interest on such bonds as the same accrue; that the corporation has not power or authority to levy any annual tax in excess of two per cent (2%) of the assessed valuation of the real and personal property in the town in any one year, and that, if the said bonds are issued, it will be necessary for the corporate authorities, in order to enable the town to retain its corporate existence, and carry on its regular functions and maintain its public school, to annu-



ally levy a tax on the real and personal property in the town in excess of two per cent (2%) of the assessed value thereof; that the town authorities are without power and authority to bind the town irrevocably to levy and collect such excess tax, as provided by Ordinance No. 64. That during the year ending March 15, 1923, the total revenue of the town was \$33,323.53 and the total disbursements on account of the running expenses of the town were \$29,903.59, and unless enjoined the town will issue and deliver said bonds amounting to \$115,000 maturing \$5,000 on July 1st of each of the years 1928 to 1942 inclusive, and \$40,000 on July 1st, 1943; that it will use the proceeds of the said bonds to acquire real and personal property outside the corporate limits of the town for the construction of its power plant; that it will sell to private individuals electric power generated at such plant, to be used outside the corporate limits of the town; that it will obligate the town to levy and collect annual taxes upon the real [31] and personal property of the town in excess of two per cent (2%) of the assessed value thereof, and in order to provide for the payment of the principal and interest on said bonds as the same may accrue, it will incur a municipal indebtedness in excess of the authority conferred upon it by law.

To this complaint (the substance of which is given above) the defendant has interposed a general demurrer and the same was argued before the Court by the respective counsel,—H. L. Faulkner,

Esq., appearing for the plaintiff and Henry Roden, Esq., appearing for the defendant.

The plaintiff bases his application for an injunction on four main grounds and the demurrer of the defendant, being as to the sufficiency of the whole complaint, all of these grounds require consideration and they are in substance as follows:

1. That the corporation has no authority to acquire property outside of the corporate limits of the town for its proposed electric light and power plant;

2. That it is not authorized or empowered by its charter, or otherwise, to sell or dispose of the electric power generated by its proposed plant to private parties for use outside its corporate limits;

3. That the town authorities have no power or authority under the Act of Congress to provide for the levy of a tax to meet the interest on said bonds as this interest may accrue, or to provide for a sinking fund for the settlement of the principal of the bonds at their maturity,—

- (a). Because the act authorizing the issue does not specifically so provide;

- (b). Because such tax will result in a levy in excess of the two per cent (2%) on the assessed value of the taxable [32] property of the town as limited by the Organic Act of the Territory;

- (c). Because the obligation to levy a tax and provide a sinking fund will cause the town to exceed its statutory limit of indebtedness; and

4. That the town council is without authority to bind itself to redeem any of the bonds issued

before the expiration of the twenty years provided for in the Act.

Considering the first cause, in my opinion, the authority of the municipality to acquire property outside of the corporate limits of the town for municipal purposes is implied in the general power granted it. In discussing this proposition, it is said by the author in *McQuillin on Municipal Corporations* (vol. III, section 1108) that "notwithstanding earlier rulings to the contrary, including *dicta* probably influenced by an eminent author on municipal corporations, it is believed that the rule, supported by the weight of authority as well as by the better reasoning, is that a municipal corporation, where not expressly prohibited, may purchase real estate outside of its corporate limits for legitimate municipal purposes. \* \* \* At present there can be no question that a municipal corporation may purchase and hold land outside its limits for certain necessary purposes such as a cemetery, or a pest house, or a water supply, or the like." Citing *Schneider vs. Menasha*, 118 Wis. 298, 95 N. W. 94; *Somerville vs. Waltham*, 170 Mass. 160, 48 N. E. 1092; *Hewitt vs. Jacinto P. R. Irri. Dist.*, 124 Cal. 186, 56 Pacific 893; *Re New York*, 99 N. Y. 569, 2 N. E. 642; *Champaigne vs. Harmon*, 98 Ill. 491, 494; *Wilson vs. Boise City*, 6 Idaho, 391, 55 Pacific 887; *Hibbard vs. Barker*, 84 Kan. 848, 115 Pac. 561. [33] But this question is settled by positive statutory enactment in this Territory. By our statute (Session Laws 1919, Chap. 50, Sec. 4) power was expressly given to municipal corpora-

tions to condemn real property under the Eminent Domain Act, for municipal purposes outside of the corporate limits of the city; thus there was impliedly given power to a municipality to acquire real property by purchase and express power was given by the statute of 1923 (Session Laws 1923, Chap. 97, Sec. 16) where it is provided that,

“For the purpose of installing, acquiring, owning or operating plants for the supply of water, light, heat or power to the city or its people \* \* \* a municipal corporation shall have the power to acquire and own property outside of the boundaries of the city and shall have jurisdiction by proper ordinance \* \* \* to protect the sources of supply of water for the city from contamination, \* \* \* .”

This settles the question as to the authority of the city to purchase and hold real estate for municipal purposes outside of its corporate limits; and the complaint of the plaintiff on that ground is without foundation.

The second ground on which the plaintiff alleges that he is entitled to the injunction is that the city is not authorized to sell electric power generated by its municipal plant to private individuals for use outside of the corporate limits of the city. This ground is also without foundation for the relief asked. The contention is based upon the future disposition of the power when the plant for which the bonds have been issued shall have been completed and afford at the present time no ground for an injunction. What future common



councils may do in this regard is not within the power of the plaintiff to state; nor can the terms of any contract which the authorities of the town may enter into be set forth by him as a ground for enjoining the sale of the bonds; therefore, a discussion on this point becomes purely academic. The allegation contained in the complaint [34] that the city will sell a substantial portion of the electric energy generated in its plant for use outside of the city limits, does not recite whether it will sell its surplus electric power after the city has been fully supplied with power and light, or whether it will dispose of power to the detriment of the inhabitants, its customers within the city. The allegation is that it proposes to and will sell a substantial portion of its power outside the city limits.

It seems to me that if the purpose of an electrical plant is to supply the individuals of a municipal corporation with light and power and, in the generation of electricity for its consumers within the city, should a surplus of light or power be generated, the municipal authorities may sell such surplus for use without the corporation. Common sense dictates that the surplus should not be allowed to run to waste and, as a matter of business, it would seem to be the duty of the municipal authorities to secure all the revenue possible from its plant provided that the primary purpose of supplying the inhabitants of the city had been fulfilled and no expense by way of extensions or enlargements of its plant with a view to supplying power to parties outside the corporate limits be incurred.

While it is generally held that a municipality has no implied authority to furnish light or power beyond its territorial limits, yet many well considered cases hold that having acquired energy in the shape of light and power for municipal purposes in excess of its present corporate needs, it is its duty to apply the surplus for the benefit of its inhabitants. See *Overall vs. Madisonville*, 102 S. W. 278; *Pikes Peak Power Co. vs. Colo. Springs*, 105 Fed. 1; *Mulligan vs. Miles City*, 153 Pac. 276; *Rogers vs. Wickluc*, 94 S. W. 24; [35] *Colorado Springs vs. Colorado City*, 94 Pac. 316; *Henderson vs. Young*, 83 S. W. 583.

The third ground for injunction is that the city has not power or authority to provide for the levy of a tax to meet the interest on the bond issue, and no authority to provide for a sinking fund. To substantiate this point it is urged that the Act of Congress does not provide for the levy of such tax nor provide for a sinking fund; it is true that the Act does not provide for a sinking fund, nor does it provide for a levy of a tax on property within the municipality to redeem the bonds. Congress, by the Act, authorized the contracting of the indebtedness for the purposes stated, and provided no method for the repayment of the indebtedness. Impliedly that was left to the municipal authorities. As was said in *Ralls County Court vs. Douglas*, 105 U. S. 733, 734, "in such case, the power to tax is necessarily an ingredient of the power to contract. When authority is granted by the legislative branch of the government to a municipality

or a subdivision of a state to contract an extraordinary debt by the issue of negotiable securities, the power to levy a tax sufficient to meet at maturity the obligation so incurred is conclusively implied unless the law which confers the authority or some general law in force at the time clearly manifests a contrary intention."

Ottawa vs. Carey, 108 U. S. 122;

Quincy vs. Jackson, 113 U. S. 337;

Scotland Co. vs. Hill, 140 U. S. 44;

Breckenridge vs. McCracken, 61 Fed. 196;

Rose vs. McKie, 145 Fed. 590;

United States vs. Saunders, 124 Fed. 128,  
and numerous other state and federal decisions.  
[36]

It is further urged that there is no provision for a sinking fund in the Act of Congress, and that the action of the common council in providing for a sinking fund and annual taxation to create the same is invalid. It is clear to me that the authority for the common council to create such a fund is implied by the act. If the power to tax is a necessary ingredient of the power to contract an indebtedness of the nature before us, the power to provide for the raising of the tax is implied.

That Congress had in view the progressive redemption of the bonds is certain since in the Act it is provided that the common council might reserve to itself the right of redemption at the rate of \$5,000 annually after five years from the date of issue of the bonds. This option having been exercised by the common council it is clear that a fund

for such redemption must be provided for, and that such fund, if the option was exercised, was in contemplation by Congress. There is also abundant authority for the proposition that in such case the power to create a sinking fund is implied.

*A statute authorizing a bond issue need not itself make provision for a sinking fund; the power is impliedly conferred.* McQuillin on Municipal Corporations, Vol. V, Sec. 2345, Note.

Vallely vs. Park Commissioners, 111 N. W., 615;

First National Bank vs. Swenson, 210 Pac. 900;  
Abbott on Municipal Corporations, Secs. 224-305.

It is further urged that the levy of an annual tax to pay interest on the bonds and provide a sinking fund for the redemption of the bonds will either result in a levy in excess of two per cent on the assessed valuation of the taxable property of the town which is the limit of taxation for any purpose [37] fixed by the Organic Act; or, if kept within that limit will so reduce the fund applicable to the ordinary running expenses of the town that its corporate existence will be imperilled, or the town will be compelled to go into debt beyond its statutory limit, and therefore, that the bond issue and the ordinance providing for the levy of the tax is void.

To this end, the plaintiff alleges that the total revenues of the town for the year ending March 15, 1923, were \$33,323.53; that the current expenses were \$29,903.59, leaving an approximate balance of excess revenue of \$3,420 from which excess the in-



terest on the bond issue of \$35,000 for school purposes and the sinking fund provided by the ordinance must be paid, leaving the interest and sinking fund for the bonds in question to be raised by taxation. This proposition is in my opinion the most serious of those presented in the complaint.

The Organic Act (24 Stat. L., 170, Sec. 9) prescribes certain limitations on municipal corporations of the Territory; among others are the following applicable to this proposition:

“Nor shall the Territory or any municipal corporation therein have power or authority to create or assume any bonded indebtedness whatever; nor to borrow money in the name of the Territory or any municipal division thereof; nor to pledge the faith of the people for any loan, directly or indirectly; nor to create or assume any indebtedness except for the actual running expenses thereof; and no such indebtedness for actual running expenses shall be created or assumed in excess of the actual income of the \* \* \* municipality for that year including as a part of such income appropriations then made by Congress and taxes levied and payable and applicable to the payment of such indebtedness and cash and other money credits on hand and not already pledged to prior indebtedness; \* \* \* *nor shall any incorporated town or municipality levy any tax for any purpose in excess of two per cent of the assessed valuation of the property within the town in any one year.*”

Giving the last clause of the limitation of the power of taxation the construction that the town is limited to a tax of two per cent for all purposes upon the assessed valuation of the property within the town, it is clear that the town to raise by [38] taxation the interest on the \$115,000 bond issue at 7% and provide a sinking fund of \$5,000 annually would, after paying the current expenses of the town as enumerated in the complaint, be compelled to levy a tax in excess of the limitation so provided; but it is not shown by any allegation of the complaint that it will be necessary to levy a tax to pay all or any considerable proportion of the interest as it accrues or any large proportion of the sinking fund provided for in the ordinance. The amount of the tax, if any is to be levied, is a matter of future computation and it is impossible for plaintiff or anyone else to say at this time that the revenues of the town will be insufficient to meet the interest payments, provide for a sinking fund and meet the current expenses. The provision for a tax levy to meet the annual expenses incorporated in the ordinance as well as the sinking fund for the gradual redemption of the authorized bonded indebtedness is a meritorious precautionary measure impliedly authorized by the Congressional Act permitting the bond issue and, in my judgment, is no ground for enjoining the sale of the bonds. The town undoubtedly has a right to anticipate that there will be increased revenues from the greater facilities provided by the proposed light and power plant, and the sale of light and power therefrom,

as well as that there shall be increased revenues from the property taxation but, aside from this, I am of the opinion that under the numerous state and federal authorities, the power is given the municipality to exceed the tax limit of two per cent of the assessed value of the taxable property of the town by the act authorizing the bond issue.

Congress, by the Organic Act, denied authority to the municipalities in general to create or assume a bonded indebtedness, to borrow money or pledge the faith of the people for any loan; or create or assume any indebtedness except for actual [39] running expenses, and limited that indebtedness to current revenue. It denied authority to levy a tax for any and all purposes in excess of two per cent of the assessed value of the taxable property in any one year. These provisions were general in their nature and applicable to all municipalities of the Territory.

By its special act, it authorized the Town of Petersburg to create the bonded indebtedness, to pledge the faith of its people for its repayment; to create an indebtedness other than for current running expenses in excess of its limit, and unless the limitation of the amount of excess be controlling, impliedly authorized the town to levy a tax to meet the indebtedness so created.

If there was a constitutional limitation on the power of the city to levy taxes, there would be a different question; but in this case the same authority which, by general law, provided the limitation, by special act authorized the issue of the

bonds and provided no means for the payment of principal and interest.

Considering the limitations provided in the Organic Act with the limitation in the amount of taxation, I am of the opinion that the tax limitation is impliedly repealed by the special authority granted the municipality to issue the bonds for the reason that the special authority to contract included the power to levy taxes for the purpose of complying with the contract even though the amount of such taxes be beyond the general statutory limitation.

Brooks vs. Memphis, Federal Cases 1954;  
United States vs. Howard County Court, 2 Fed.

1;

People vs. Rigney, 63 Cal. 296;

Dillon vs. Aurora, 114 Ill. 138, 28 N. E. 461.

[40]

The power of officers of a municipality to levy sufficient taxes to pay its bonds is a legal inference from the authority of the city to issue its bonds, in the absence of any limitation or inhibition in the act which created the power, in the general law or the Constitution.

Loan Association vs. Topeka, 20 Wall. 653;

United States vs. New Orleans, 98 U. S. 381,  
393;

Ralls Co. Court vs. U. S., 105 U. S. 733, 735,  
736.

If the intent of Congress was to limit the payment of the bonds to current revenue or revenues derived from the sale of the electric light and en-



ergy, it surely would have so provided in the statute authorizing the issuance of the bonds. Presumably Congress was aware of the limitation in the Organic Act, and when authority was granted to issue the bonds it had that in view, as well as the decision of the Supreme Court that there impliedly must be a provision for payment by taxation, as was said by Mr. Justice Miller in *Loan Association vs. Topeka*, *supra*, "it follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can be lawfully levied to pay the debt, the contract is void for want of authority to make it."

No presumption can be made that Congress in authorizing the issue of the bonds had any other view than that provision for payment of the bonds should be made by the city by taxation, even though by that provision special taxes be levied which might exceed the general statutory limitation.

The other ground for enjoining the issuance of the bonds that the town would by the issuance thereof and providing for a sinking fund, exceed the statutory limit of indebtedness, and that the Common Council had no authority to provide a sinking fund, are without merit. As to the first, the limit of [41] indebtedness clause is repealed by the act allowing the bond issue in that such limitation refers to indebtedness for current expenses; and as to the latter, authority is expressly given to the common council by the act authorizing the issue of the bonds at its option to provide for

redemption of the bonds after five years from their date at the rate of \$5,000 annually.

The conclusion which I have reached after a careful consideration of the complaint is that there is no ground set forth therein which would justify the Court in enjoining the issuance and sale of the bonds described therein, and therefore, the demurrer should be sustained.

THOS. M. REED,  
District Judge.

Dated, Juneau, Alaska, August 28, 1923.

Filed in the District Court, Territory of Alaska,  
First Division. Aug. 30, 1923. John H. Dunn,  
Clerk. [42]

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In the District Court for the Territory of Alaska  
Division Number One, at Juneau.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.

**Order Sustaining Demurrer.**

This cause came on regularly to be heard on the 25th day of August, 1923, upon the general demurrer interposed by defendant to plaintiff's complaint; H. L. Faulkner, Esq., appearing for plaintiff and Henry Roden, appearing for defendant;

argument was heard by the Court and the Court reserved its decision; and now, on this 29th day of August, 1923, the Court having considered the same and being fully advised in the premises:

It is ordered that the defendant's general demurrer to plaintiff's complaint be, and the same hereby is sustained.

Dated this 29th day of August, 1923.

THOS. M. REED,  
District Judge.

Copy received 8/29/23.

H. L. FAULKNER,  
Plaintiff's Attorney.

Entered Court Journal No. S page 254.

Filed in the District Court, Territory of Alaska, First Division. Aug. 29, 1923. John H. Dunn, Clerk. By ———, Deputy. [43]

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In the District Court for the Territory of Alaska  
Division Number One, at Juneau.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.

**Judgment.**

Be it remembered that on the 25th day of August, 1923, the demurrer of the above-named defendant

to plaintiff's complaint on the ground that said complaint does not state facts sufficient to constitute a cause of action, came on regularly for hearing; that thereafter and on the 29th day of August, 1923, the Court sustained the said demurrer and entered its order accordingly, to which the plaintiff duly excepted; thereupon the plaintiff announces that he will stand upon his complaint and plead no further and moves the Court that judgment be entered herein upon the pleadings to the end that relief may be granted plaintiff by writ of error:

It is therefore ordered and adjudged that plaintiff take nothing by this action, and that the defendant recover its costs and expenses herein.

Done in open court this 29th day of August, 1923.

THOS. M. REED,  
District Judge.

Entered Court Journal No. S page 254.

Filed in the District Court, Territory of Alaska, First Division. Aug. 29, 1923. John H. Dunn, Clerk. By ———, Deputy. [44]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.



**Petition for Leave to Appeal.**

To the Honorable Thomas M. Reed, Judge of the District Court, Division Number One, at Juneau, Alaska:

The above-named plaintiff, Paul Lund, conceiving himself aggrieved by the order and judgment made and entered in the above-entitled court and cause on August 29, 1923, whereby it was and is ordered and adjudged as follows, to wit:

First. That defendant's general demurrer to plaintiff's complaint be and the same hereby is sustained.

Second. That plaintiff take nothing by this action and that the defendant recover its costs and expenses herein does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from said order and judgment for the reasons set forth in the assignment of errors, and prays that this its petition for the said appeal be allowed and that a transcript of the record proceedings and papers upon which said judgment was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Dated at Juneau, Alaska, August 30, 1923.

H. L. FAULKNER,  
Attorney for Plaintiff.

Filed in the District Court, Territory of Alaska, First Division. Aug. 30, 1923. John H. Dunn, Clerk. By ———, Deputy. [45]

**Order Granting Petition for Appeal.**

The foregoing petition for appeal is granted and the claim of appeal therein made is allowed and the cost bond is fixed in the sum of Two Hundred and Fifty (\$250.00) Dollars.

THOS. M. REED,  
Judge.

Copy received August 30th, 1923.

HENRY RODEN,  
Attorney for Defendant.

Entered Court Journal No. S, page 256.

Filed in the District Court, Territory of Alaska,  
First Division. Aug. 30, 1923. John H. Dunn,  
Clerk. By \_\_\_\_\_, Deputy. [46]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.

**Assignments of Error.**

Paul Lund, plaintiff in the above-entitled cause assigns the following error made by the Trial Court in the rendition and entry of the judgment herein and the order sustaining the demurrer of defendant

to plaintiff's complaint upon which the said plaintiff and appellant will reply in the United States Circuit Court of Appeals for the Ninth Circuit for a reversal of the said judgment and said order sustaining the demurrer, as follows, to wit:

### I.

The Court erred in making its Order sustaining the demurrer to plaintiff's complaint, which said order (omitting title) is in words and figures as follows:

"This cause came on regularly to be heard on the 26th day of August, 1923, upon the general demurrer interposed by defendant to plaintiff's complaint; H. L. Faulkner, Esq., appearing for plaintiff and Henry Roden appearing for defendant; argument was heard by the Court and the Court reserved its decision; and now, on this 29th day of August 1923, the Court having considered the same and being fully advised in the premises:

"It is ordered that the defendant's general demurrer to plaintiff's complaint be and the same hereby is sustained.

"Dated this 29th day of August 1923.

"(Signed) THOS. M. REED,  
"District Judge."

### II.

The Court erred in making and entering herein its judgment, which said judgment (omitting title) is in words and figures as follows: [47]

"Be it remembered that on the 25th day of August, 1923, the demurrer of the above-named defendant to plaintiff's complaint on the ground that said complaint does not state facts sufficient to consti-

tute a cause of action, came on regularly for hearing; that thereafter and on the 29th day of August, 1923 the Court sustained the said demurrer and entered its order accordingly, to which the plaintiff duly excepted; thereupon the plaintiff announces that he will stand upon his complaint and plead no further and moves the Court that judgment be entered herein upon the pleadings to the end that relief may be granted plaintiff by writ of error.

“It is therefore ordered and adjudged that plaintiff take nothing by this action, and that the defendant recover its costs and expenses herein.

“Done in open court this 29th day of August, 1923.

“THOS. M. REED,

“District Judge.”

WHEREFORE the plaintiff prays that on account of the errors hereinbefore mentioned and others manifest of record herein, the order allowing the demurrer, and the judgment of the District Court of the District of Alaska, Division No. 1, in this cause be reversed, and the cause remanded, with instructions to enter judgment and decree in favor of the plaintiff herein.

H. L. FAULKNER,

Attorney for Plaintiff.

Copy received August 30, 1923.

HENRY RODEN,

Attorney for Defendant.

Filed in the District Court, Territory of Alaska, First Division. Aug. 30, 1923. John H. Dunn, Clerk. [48]



In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.

**Bond On Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, Paul Lund, plaintiff-appellant herein, and Allen Shattuck and W. W. Casey as sureties, all residents of the Territory of Alaska, Division No. One, are held and firmly bound unto the above-named Town of Petersburg defendant-appellee, in the sum of Two Hundred and Fifty Dollars (\$250.00) to be paid to the said defendant-appellee, for the payment of which sum well and truly to be made, we bind ourselves, and each of us, and each of our heirs, executors, administrators, successors of assigns, jointly and severally firmly by these presents.

Sealed with our seals, and dated this 30th day of August, in the year of our Lord one thousand nine hundred and twenty-three.

Whereas the above-named, Paul Lund, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the Judgment and Decree rendered in the above-entitled

suit by the District Court for the District of Alaska, Division No. One;

NOW THEREFORE, the condition of this obligation is such that if the above-named Paul Lund shall prosecute his said appeal to effect and answer all damages and costs, if he fails to make said appeal good, then this obligation shall be void; otherwise the same shall be in full force and effect.

PAUL LUND,

By H. L. Faulkner,

His Attorney, Principal.

ALLEN SHATTUCK,

Surety.

W. W. CASEY,

Surety. [49]

United States of America,  
Territory of Alaska,—ss.

I, Allen Shattuck, whose name is subscribed to the within bond as surety thereon, being first duly sworn, depose and say that I am a resident of the Territory of Alaska, and not an attorney at law nor counsellor, clerk of any court, nor other officer of any court, and that I am worth the sum of Two Hundred and Fifty (\$250.00) Dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

ALLEN SHATTUCK.

SUBSCRIBED and SWORN to before me this 30th day of August, 1923.

[Seal]

J. H. HART,

Notary Public for Alaska.

My commission expires Nov. 13, 1926.

United States of America,  
Territory of Alaska,—ss.

I, W. W. Casey, whose name is subscribed to the within bond as surety thereon, being first duly sworn, depose and say that I am a resident of the Territory of Alaska and not an attorney at law, nor counsellor, clerk of any court nor any other officer of any court, and that I am worth the sum of Two Hundred and Fifty (\$250.00) Dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

W. W. CASEY.

SUBSCRIBED and SWORN to before me this  
30th day of August, 1923.

[Seal]

J. H. HART,

Notary Public for Alaska.

My commission expires 11/13/26.

Approved this 30th day of August, 1923.

THOS. M. REED,

Judge.

Filed in the District Court, Territory of Alaska,  
First Division. Aug. 30, 1923. John H. Dunn,  
Clerk. [50]

In the District Court for the Territory of Alaska,  
Division Number One, at Juneau.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.

**Citation on Appeal.**

United States of America,—ss.

To the Town of Petersburg, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, Cal., within thirty days from and after this date, pursuant to an appeal filed in the Clerk's Office of the District Court for the District of Alaska, Division Number One, at Juneau in the above-entitled cause, wherein Paul Lund, the appellant herein, was plaintiff, and the Town of Petersburg, appellee herein, was the defendant; to show cause, if any there be why the judgment and decree entered in said cause of Paul Lund, plaintiff, vs. The Town of Petersburg, defendant, and referred to in the petition for an appeal filed in said cause, which said appeal was by order of the Court allowed, as prayed for, should not be corrected and speedy justice done to the parties in that behalf.



WITNESS The Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 30th day of August, in the year of our Lord one thousand nine hundred and twenty-three.

THOS. M. REED,  
Judge of the District Court, District of Alaska,  
Division Number One.

Attest: [Seal]

JOHN H. DUNN,  
Clerk.

Service admitted August 30th, 1923.

HENRY RODEN,  
Attorney for Defendant-Appellee. [51]

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In the District Court for the District of Alaska,  
Division Number One, at Juneau.

No. 2322-A.

PAUL LUND,

Plaintiff,

vs.

THE TOWN OF PETERSBURG,

Defendant.

**Praeipce for Transcript of Record.**

To the Clerk of the District Court, District of Alaska, Division Number One:

You will please prepare a transcript of the record in the above-entitled cause and transmit the same to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, to be used in the appeal herein, said transcript to include the following:

Complaint.

Demurrer.

Memorandum decision.

Order sustaining demurrer.

Judgment.

Petition for appeal and order allowing same.

Assignments of error.

Bond on appeal.

Citation.

This praecipe.

All of which are to be prepared with a view to transmitting the same to the United States Circuit Court of Appeals for the Ninth Circuit in connection with the appeal herein within the time limited by the rules of that court, and when so prepared, you will kindly transmit this record to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

H. L. FAULKNER,

Attorney for Plaintiff.

Copy received August 30th, 1923.

HENRY RODEN,

Attorney for Defendant.

Filed in the District Court, Territory of Alaska, First Division. Aug. 30, 1923. John H. Dunn, Clerk. By ———, Deputy. [52]

In the District Court for the District of Alaska,  
Division Number One, at Juneau.

United States of America,  
District of Alaska,  
Division Number One,—ss.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division Number One, hereby certify that the foregoing and hereto attached 52 pages of typewritten matter, numbered from 1 to 52, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record as per the praecipe of appellant, on file herein and made a part hereof, in the cause wherein Paul Lund, is appellant, and the Town of Petersburg, Alaska, a Municipal Corporation, is appellee, No. 2322-A, as the same appears of record and on file in my office; and that said record is by virtue of a petition for appeal and citation issued in this cause and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office and that the cost of preparation, examination, and certificate, amounting to Twenty-four and 90/100 (\$24.90) has been paid to me by counsel for appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and the Seal of the above-entitled Court, this 31st day of August, A. D. 1923.

[Seal]

JOHN H. DUNN,  
Clerk.

[Endorsed]: No. 4094. United States Circuit Court of Appeals for the Ninth Circuit. Paul Lund, Appellant, vs. Town of Petersburg, a Municipal Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division Number One.

Filed September 7, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.





NO. 4094

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IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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PAUL LUND,

*Plaintiff-Appellant,*

VS.

TOWN OF PETERSBURG,

*Defendant-Appellee.*

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**BRIEF FOR APPELLANT**

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UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT  
OF ALASKA, DIVISION NUMBER  
ONE, AT JUNEAU.

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H. L. FAULKNER,  
Juneau, Alaska,  
Attorney for Appellant.



NO. 4094

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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PAUL LUND,

*Plaintiff-Appellant,*

VS.

TOWN OF PETERSBURG,

*Defendant-Appellee.*

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**BRIEF FOR APPELLANT**

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UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT  
OF ALASKA, DIVISION NUMBER  
ONE, AT JUNEAU.

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**STATEMENT.**

This is an action brought by Appellant, who was the plaintiff in the lower Court, against the Town of Petersburg, a municipal corporation, the defendant below, to enjoin the said Town of Petersburg from issuing its bonds for the purpose of erecting an electric light plant.



On September 29, 1919, Congress passed an Act authorizing the Town of Petersburg, a municipal corporation, to issue bonds in the sum of \$75,000.00 for the purpose of erecting an electric light plant and a school house, of which \$50,000.00 was to be expended for the construction and installation of an electric light and power plant, and \$25,000.00 in the construction of a public school building. (Tr. p. 13 ).

On June 5, 1920, Congress amended this Act by another Act and authorized the issuance of bonds in a sum not exceeding \$150,000.00 for the purpose of constructing and installing a municipal electric light plant and a public school building, of which the sum of \$115,000.00 was to be used for the construction of an electric light plant and \$35,000.00 for the erection of a school house. (Tr. p. 15 ).

The Town of Petersburg, after an election as provided by the Acts of Congress above mentioned, and in the manner prescribed by law, passed Ordinance No. 64 (Tr. p. 25 ), providing for the issuance, sale, maturity and redemption of the bonds authorized for the erection of an electric light and power plant.

Ordinance No. 64 provides for the maturity and payment of said power bonds as follows: \$5,000.00 on July first of the years 1928, to 1942, inclusive, and \$40,000.00 on July first, 1943; and that interest shall be paid on the bonds semi annually at the rate of seven per cent per annum.

Appellant alleged that the Town of Petersburg had sold and was now about to issue and deliver \$35,000.00 general bonds of the Town for the purpose of the erection of a school building, as authorized by the Acts of Congress, hereinbefore mentioned, and that the Town was about to issue and sell the bonds in the sum of \$115,000.00 for the erection of an electric light plant in the manner provided in Ordinance No. 64; and that unless restrained, the Town of Petersburg intended to use the proceeds of the sale of said bonds to acquire real and personal property outside its corporate limits for the construction of a municipal electric light and power plant, transmission lines, etc., and that when the power plant was erected, the town would sell current and electric energy to private individuals and corporations to be consumed outside the corporate limits of the town, and it would thereby obligate the town and its common council to levy and collect annual general taxes upon real and personal property in the town in excess of two per cent. of the assessed valuation of said property, and would incur a municipal indebtedness in excess of the authority conferred upon it by law.

Appellant prayed for an injunction permanently enjoining the town from issuing all or any part of the bonds for the erection of a light and power plant.

Appellant alleged in his complaint that the total population of the Town of Petersburg was ap-

proximately one thousand and the total assessed valuation of all its taxable property was \$598,-780.00 and that the total annual revenue of the town from all sources, including taxes and licenses was \$33,323.53 and that the total disbursements for school and municipal purposes was \$29,903.56 annually. (Par. 20, Complaint, Tr. p. 10 ).

Appellant also alleged that in addition to the general expenses for school and municipal purposes heretofore required, the town had sold and was about to issue and deliver the \$35,000.00 general bonds of the town authorized by the Acts of Congress for the erection of a public school building, thereby incurring further obligations for the payment of these bonds and the semi annual interest due upon them.

A general demurrer was interposed by defendant-appellee to this complaint and the matter was submitted to the Court upon the demurrer, and the Court on August 29, 1923, made and entered an order sustaining the demurrer, and on the same date judgment was entered in accordance with the order sustaining the demurrer.

### ASSIGNMENTS OF ERROR.

There are two assignments of error, which present the same questions; namely:

#### I.

Was it error to make an order sustaining the demurrer to plaintiff's complaint?

## II.

Was it error to enter the judgment in favor of defendant-appellee upon such order?

## POINTS, ARGUMENTS AND AUTHORITIES.

The questions presented by this appeal are the following:

## I.

Has the Town of Petersburg authority to levy a tax upon real and personal property in excess of two per cent annually upon the assessed valuation of said property within the corporate limits in order to provide for the payment of the bonds and the interest on the same?

## II.

Has the Town of Petersburg authority to sell electric current and power to be used and consumed outside the corporate limits of the town?

## III.

Has the Town of Petersburg authority to bind itself to pay the bonds before the expiration of the period prescribed in the Acts of Congress authorizing their issuance?

## I.

HAS THE TOWN OF PETERSBURG  
AUTHORITY TO LEVY A TAX UPON REAL  
AND PERSONAL PROPERTY IN EXCESS OF  
TWO PER CENT. ANNUALLY UPON THE



ASSESSED VALUATION OF SAID PROPERTY  
WITHIN THE CORPORATE LIMITS IN ORDER  
TO PROVIDE FOR THE PAYMENT OF THE  
BONDS AND THE INTEREST ON THE SAME?

The Acts of Congress authorizing the bond issue do not make any provision for the levy of an additional tax for the retirement of the bonds; and the Act does not authorize bonds to be issued in any specific sum, but authorizes the Town to issue bonds for the erection of an electric light and power plant and a public school building in a sum not exceeding \$150,000.00, of which sum not to exceed \$115,000.00 is to be used for the construction of an electric light and power plant and system.

All the allegations of the complaint are admitted by the general demurrer; and the complaint alleges that unless additional taxes are imposed, the bonds cannot be retired nor the interest paid. The assessed valuation of all real and personal property within the corporate limits is less than \$600,000.00, and the ninth subdivision of Section 627 of the Compiled Laws of Alaska, from which the Town derives its powers, gives the town authority "to assess, levy and collect a general tax for school and municipal purposes not to exceed two per centum of the assessed valuation upon all real and personal property. \* \* \*"

Section 628 of the Compiled Laws of Alaska provides "that the council shall have no authority to issue bonds or incur any bonded indebtedness,

nor shall they have authority to incur a greater indebtedness or liability of any kind in any year than the current revenues of the municipality for that year."

By the Acts of September 29, 1919, and June 5, 1920, Congress has amended this Section insofar as it is applicable to the Town of Petersburg by giving it authority "to issue bonds and incur a bonded indebtedness," but it has given the town no authority to incur a greater indebtedness or liability in any year than the current revenues of the town for that year. The authorization by Congress of this bond issue does not conflict with the provisions of Section 628, prohibiting the town from incurring any greater indebtedness or liabilities in any year than the current revenues of the town for that year. The bonds are authorized as before stated, not in any specific amount, but in a sum *not exceeding* \$115,000.00, and Congress must have assumed that the town would not issue bonds in a greater sum than its current revenues, derived under the provisions of Section 627, Compiled Laws of Alaska, were sufficient to pay.

"A statute authorizing a municipality to issue bonds 'in any amount' in aid of a railroad will be construed to mean any amount within the constitutional or statutory limit, and therefore not in conflict with it."

28 Cyc, 1583.

*Atl. Trust Co. v. Darlington*, 63 Fed. 76.

*McQuillan on Municipal Corporations*, Sec.

2284.

“In the construction of a grant of any power to tax made by a state to one of its municipalities, the rule accepted by all the authorities is that it should be with strictness. If the authority of the municipality to tax is doubtful, the doubt must be always resolved against the tax. The reasonable presumption is held to be that the state has granted in clear and unmistakable terms all that it has intended to grant, and whatever authority the municipal officers assume to exercise, they must be able to show a warrant for it in the words of the grant. \* \* The mischief of a strict construction is easily obviated by the legislature, but the mischief of a liberal construction may be irremedial before it can be reached.”

*McQuillan on Municipal Corporations*, Sec. 2371.

The general rule in such cases is that in case of doubt the power must be denied.

*McQuillan on Municipal Corporations*, Sec. 352.

## II.

HAS THE TOWN OF PETERSBURG  
AUTHORITY TO SELL ELECTRIC CURRENT  
AND POWER TO BE USED AND CONSUMED  
OUTSIDE THE CORPORATE LIMITS OF THE  
TOWN?

There are authorities holding that a city which owns a municipal water works system or electric light and power system may contract to sell its

*surplus power* outside the corporate limits, but the city has no implied power to furnish water or light beyond its territorial limits.

*McQuillan on Municipal Corporations*, Sec. 1800.

The power to provide for electric lights and power by the municipality is found in the 6th subdivision of Section 627 of the Compiled Laws of Alaska. This statute gives the city the "power to provide for fire protection, water supply, *lights*, wharfage, public health, police protection, and the relief of the destitute and indigent."

This section has been amended by Chapter 97 of the Session Laws of Alaska, 1923, approved May 4, 1923, as follows:

"4th. To purchase, construct or otherwise establish and maintain plants for the distribution and use *in the City* of light, heat and power by electricity, gas or otherwise; to similarly establish and maintain for use *within the city* telephone systems, water works, electric light and power plants for the purpose of serving the city and the public. Provided, however, such public utilities as provided in this subdivision shall not be operated or maintained by funds raised by taxation but from revenues collected for services rendered by such plants or utilities by customers or users thereof."

4th Subdiv. Sec. 12, Chapt. 97, Session Laws of Alaska, 1923.

It will thus be seen that neither of these laws gives the city the authority to provide for electric current and power to persons or corporations out-



side the corporate limits; and the Acts of Congress of September 29, 1919, and June 5, 1920, are silent upon this subject.

“It is a general principal that a municipal corporation cannot usually exercise its powers beyond its own limits and if it has authority to do so, it must be derived from some statute which expressly or impliedly permits it.”

*Coldwater v. Tucker*, 24 Am. Rep. 601.

“Ballenger’s Annotated Codes and Statutes, Sec. 739, and the charter of a city of the first class give it power to acquire water works and to supply the city and its inhabitants with water. Laws of 1897, page 326, Chapter 112, Sec. 1, in defining the powers of city to construct and operate water works, confines the purpose to the furnishing of such city or inhabitants thereof ‘and any other persons’ with a supply of water. Held that the phrase ‘any other person’ only applies to persons within the corporate limits; and a city of the first class has no authority to supply water to another municipality.”

*Farwell v. City of Seattle*, 86 Pac. 217.

There are authorities holding that where a city owns a municipal lighting plant or water system, the principles of good business require that *surplus* water or power may be sold to consumers outside the city limits. But in this case, in sub-division “c” of paragraph 21 of the complaint (Tr. p. 11 ), it is alleged that the city will sell to private individuals, firms and corporations *electric energy* generated by said power plant to be used and consumed

outside the corporate limits of said town. It is not alleged that the city will sell only its surplus power but the allegation is that the city will sell *electric energy*, etc., to be used and consumed outside the corporate limits.

The city does not deny that it will do this, and does not meet this allegation by stating that it will sell only its surplus power; but the allegations of the complaint are admitted for the purpose of the demurrer, and if the District Court was correct in sustaining the demurrer, there would be nothing to prevent the city of Petersburg, after the electric light plant is established, from selling current to consumers outside the city at the expense of the residents and tax payers within the corporate limits. The city might have at times insufficient power to meet the demands of outside consumers and also the demands of its own inhabitants; and a tax payer might own an establishment in the city upon which he is paying taxes for the retirement of the bonds, and he might require power or electric current which the city could not supply him, on account of the demands made upon it by outside consumers under contracts or agreements with the city. Such a state of affairs might easily arise and a man whose property is not subject to taxation by the city for the reason it is outside the corporate limits may get the preference in the matter of service over the man whose property is in the city and subject to a heavy tax for the payment of the bonds and interest.

## III.

HAS THE TOWN OF PETERSBURG  
AUTHORITY TO BIND ITSELF TO PAY THE  
BONDS BEFORE THE EXPIRATION OF THE  
PERIOD PRESCRIBED IN THE ACTS OF CON-  
GRESS AUTHORIZING THEIR ISSUANCE?

Section 7 of Ordinance No. 64 provides for the creation of a sinking fund for the payment of the bonds as they mature, and the interest thereon. This section provides for the levy of a tax upon all real and personal property situated within the corporate limits of the town subject to taxation in an amount sufficient to pay the interest and the installments of principal, etc. (Tr. p. 33 ).

Section 2 of Ordinance No. 64 (Tr. p. 27 ) provides that the bonds shall mature at the rate of \$5,000.00 each year from 1928 to 1942, and \$40,000.00 on July 1, 1943.

There is no provision in the Act of Congress of September 29, 1919, or the Act of June 5, 1920, for the creation of a sinking fund and the Ordinance provides that this sinking fund be created by the levy of a tax on real and personal property; and it is submitted that the appellee concedes that the revenues of the city would not be sufficient to retire these bonds, pay the interest, and provide a sinking fund without the levy of a tax in excess of the limit already provided in the 9th subdivision of Section 627, Compiled Laws of Alaska.

If the council of the town of Petersburg could provide such a sinking fund as prescribed in Ordinance No. 64, why might it not provide a greater sinking fund and increase the taxes on real and personal property in proportion to the size of the sinking fund required. If the city council may levy an additional tax of two per cent upon all real and personal property for the purpose of creating a sinking fund, why might it not levy a tax of four per cent. or eight per cent. for such purpose. In view of the authorities cited above that the powers of a municipality to tax should be construed with strictness, we submit that the city has no authority to levy this additional tax for the creation of a sinking fund.

Respectfully submitted,

H. L. FAULKNER,

*Attorney for Appellant.*





IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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PAUL LUND,

*Plaintiff-Appellant,*

VS.

TOWN OF PETERSBURG,

*Defendant-Appellee.*

---

UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT  
OF ALASKA, DIVISION NUMBER  
ONE, AT JUNEAU.

---

**BRIEF OF APPELLEE**

---

HENRY RODEN,  
Juneau, Alaska,  
Attorney for Appellee.



NO. 4094

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IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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PAUL LUND,

*Plaintiff-Appellant,*

VS.

TOWN OF PETERSBURG,

*Defendant-Appellee.*

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UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT  
OF ALASKA, DIVISION NUMBER  
ONE, AT JUNEAU.

---

**BRIEF OF APPELLEE**

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ARGUMENT.

The appellant complains because the lower court sustained a general demurrer and entered judgment dismissing his complaint.

In his opening brief plaintiff presents three questions for the consideration of the Court; they are:



1st: May the Municipality of Petersburg levy a tax upon real and personal property within its limits in excess of 2% annually upon the assessed valuation of such property?

2d: May the Town of Petersburg sell electric power to be used outside the corporate limits?

3d: Has the Town of Petersburg authority to bind itself to pay the bonds before the expiration of the period prescribed by the Act of Congress under which such bonds are authorized?

The Acts of Congress under which said Town of Petersburg proposes to issue the bonds are found in the printed record, at pages 12, 13, 14 and 15 thereof. Both Acts are the same except that the second permits a total issue of \$150,000 worth of bonds.

The questions raised by the appellant concern the issuance and sale of Electric Light & Power Bonds in an amount not exceeding \$115,000.00.

Like the appellant, the appellee will consider the various points raised in their numerical order.

## I.

HAS THE TOWN OF PETERSBURG  
AUTHORITY TO LEVY A TAX UPON REAL  
AND PERSONAL PROPERTY IN EXCESS OF  
TWO PER CENT. ANNUALLY UPON THE  
ASSESSED VALUATION OF SAID PROPERTY

WITHIN THE CORPORATE LIMITS IN ORDER TO PROVIDE FOR THE PAYMENT OF THE BONDS AND THE INTEREST ON THE SAME?

Congress has granted to the Town of Petersburg power and authority to issue bonds for the construction of a Municipal Light & Power Plant. Has it also given power to pay the interest on such bonds and to provide for a sinking fund to redeem and pay for them? The Congressional Acts are silent upon these points.

Under the general Municipal Law in Alaska a municipality cannot incur a greater indebtedness or liability in any one year than the current revenues of the municipality for that year, nor can a municipality issue any bonds.

Unquestionably the Acts of Congress referred to were passed to overcome the provisions of this section.

It is claimed that the Town of Petersburg, like other municipalities in the Territory of Alaska, is limited in its power of taxation to two per cent. of the assessed value of all real and personal property within the corporate limits, and that the total assessed value of all such property the past year was less than \$600,000.00, and that consequently the returns from this source are not sufficient to meet the ordinary municipal expenses and in addition thereto the interest charges on the bonds and

the requirements of the ordinance providing for a sinking fund.

In answer it may be said that it nowhere appears in the complaint that the Town of Petersburg has exercised its full taxing power. It is not shown that a full two per cent. levy on all taxable property has been made, nor is it shown that the property subject to taxation has been assessed at anything like its fair value; and it may reasonably be inferred that, as neither of these points is covered in the complaint, they do not in fact exist, in other words, that the revenues from taxation can be greatly increased by levying a full two per cent. and assessing the taxable property at its full but fair value.

Granting for the sake of argument that last year's revenues of the Town are not sufficient to cover all municipal requirements and, in addition, the interest charges and sinking fund requirements, there is no allegation in the complaint to indicate that in the future the revenues of the Town will not be sufficient to cover all requirements. The amount of the tax, as the Lower Court in its opinion states, if any is to be levied, "is a matter of future computation, and it is impossible for plaintiff or anyone else to say at this time that the revenues of the Town will be insufficient to meet the required payments." The town may anticipate increased revenues from property taxation and from the greater facilities provided by the proposed Light &

Power Plant and the sale of light and power therefrom.

*Commissioners of Pitt County v. McDonald et al*; 61 SE 643.

Aside from all this, we respectfully suggest that the Municipality of Petersburg having from Congress authority to incur a special indebtedness has also implied authority to levy a tax in excess of two per cent. of the assessed value of the total property within the municipality.

The provisions of law referred to, limiting the municipal taxing power to two per cent., refers to revenues used for the ordinary and usual business of the municipality.

It must be remembered that there is no constitutional limitation of the taxing power of a municipality in Alaska.

Congress, as the Sovereign, in the Organic Act limited the municipal taxing power to two per cent. for ordinary, usual municipal purposes, the same as it limited the amount of indebtedness to be incurred annually to the annual municipal revenues.

The same Sovereign, at a later date, empowered one such municipality to incur a greater indebtedness, for an unusual and other than running expense, and to pledge the faith of its inhabitants for its repayment, and fixed a time when repayment shall be made. Having given authority to incur an unusual expense and to issue bonds for the same,



having fixed the interest charge on such bonds and the time for their redemption, in other words,—*having given special authority to contract a debt, will it not be inferred that there is implied authority to raise funds wherewith to meet the debt by taxation, even though the amount of such taxes be beyond the limitation set by the statute providing for general municipal purposes?*

This position is sustained by a long list of Federal and State decisions.

“The power given to a city council to create an indebtedness by issuance and sale of bonds necessarily implies the power to raise the means with which to pay the interest and create a sinking fund.”

*First National Bank v. Sorenson*, 210 Pac. 900.

A very instructive opinion upon this point has been rendered by the U. S. Circuit Court of Appeals for the Sixth Circuit. The Court explicitly lays down the proposition that

“Authority to a municipal corporation to levy a tax to pay a debt whose creation is authorized by law may be implied when no mode for payment is provided, and there is no limitation upon the power of taxation which repels such an inference; and *where the debt is for an extraordinary purpose, requiring special authority for its creation, a general limitation upon the power of taxation for ordinary municipal purposes will not exclude such inference;*

but if the Act conferring the power to create the debt, or any other law in force at the time, contains provisions for a tax to meet such obligations no extraordinary powers of taxation can be implied therefrom."

*City of Cleveland v. U. S.*, 111 Fed. 341.

We submit this decision covers our case. The Town of Petersburg has Congressional authority to contract a debt; no mode for its payment is provided; the debt is for an extraordinary purpose which required special authority for its creation; we have a general limitation upon the power to tax for ordinary municipal purposes; the Acts conferring the power to create the debt contain no provision to meet the obligation, and there is nothing which in any way repels the inference that we have implied authority to levy a tax to pay such debt.

"The act gives express power to incur a bonded indebtedness. This is an implied authorization to make provision for the payment of the same. The express power to incur an indebtedness is held to include within such power the power to do all things necessary to effecuate the purpose of the act."

*Vallelly v. Grand Forks etc.* 111 N. W. 615.  
15 L. R. A. N. S. 61.

"The Act authorized an extraordinary indebtedness of the City, and as neither the laws under which the drainage was made nor any other law made any express provision for the payment of the indebtedness so authorized, it is properly and necessarily implied that the legislature intended to authorize the City, as

occasion might require, to levy a special tax to discharge the indebtedness authorized."

*United States v. Capdevielle*, 118 Fed. 812  
(Fifth Circuit).

The Supreme Court of the United States has also ruled upon the question a numberr of times.

The only method which the Town of Petersburg has to pay this bonded indebtedness is by means of taxation for, if Congress had intended that such indebtedness should be paid from returns of the Light Plant, it would surely have said so.

In: *Loan Assn. v. Topeka*, 20 Wall., 660.  
87 U. S. 460, it was held:

"It is therefore to be inferred that when the legislature authorizes a county or city to contract a debt by bond, it intended to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the Act itself, or in some general statute, a limitation upon the power of taxation which repels such inference."

Again

"The power of officers of a municipality to levy sufficient taxes to pay its bonds is a legal inference from the authority of the City to issue its bonds in the absence of any limitation or inhibition in the Act which created the power, in the general law or the Constitution."—*Id.*

"When authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation ac-

companies it; and this too without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom indeed as to be exceptional—any means to discharge their pecuniary obligations except by taxation.

“When, therefore, a power to contract a debt is conferred it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former and *such implications cannot be overcome except by express words excluding it.*”

*The United States ex rel. Morris Ranger v. City of New Orleans*, 98 U. S.-381; 25 Law Ed. 525.

It is fair to say in this connection that Congress, when passing the Bond Acts now under consideration, was fully informed concerning conditions in Alaska. It knew the limitations upon the taxing power of municipalities—it knew that the indebtedness to be created by the sale of the bonds would exceed the ordinary amount of expenses allowable to be incurred under existing laws and it must have known that, authorizing an extraordinary expense or debt to be contracted, the ordinary and existing power to tax would not be sufficient to provide for the payment of the interest and principal when due. It made no provision in the acts for the payment of these items; it gave the town the power to contract and incur a debt and it must, necessarily, have intended to give it the power to provide for the payment of this debt.



Said the Supreme Court of the United States in  
*County Court of Ralls County v. United*  
*States*, 105 U. S. 733; 26 Law. Ed.  
 1220;

“It must be considered as settled in this court, that when authority is granted by the legislative branch of the government to a municipality or subdivision of a State, to contract an extraordinary debt by the issuance of negotiable securities, the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred *is conclusively implied*, unless the law which confers the authority, or some general law in force at that time, clearly manifests a contrary legislative intention. \* \* The power to tax is necessarily an ingredient of such a power to contract, as ordinarily, political bodies can only meet their pecuniary obligations through the instrumentality of taxation. \* \* \*”

As already stated, where the act authorizing the issuance of the bonds particularly provides how payment of the debt shall be met, the purchaser of the bond is limited to the remedy provided for—he may compel a levy of the amount fixed in the act.

This question was before the United States Supreme Court in

*United States ex rel. Huidekoper v. County*  
*Court of Mason County*, 99 U. S. 591;  
 25 Law. Ed. 331.

In this case Mr. Chief Justice Waite, delivering the opinion of the Court said:

“When the Act to incorporate the Missouri and Mississippi Railroad Company was passed, the power of counties to tax for general purposes was limited by law to one-half of one per cent. on the taxable property in the County. This limit has never since been increased and the Constitution now in force provides that this tax shall never be increased. *If there had been nothing in the Act to the contrary, it might, perhaps have been fairly inferred that it was the intention of the Legislature to grant full power to tax for the payment of the extraordinary debt authorized, to an amount sufficient to meet both principal and interest at maturity. This implication is however repelled by the special provision for the tax of one-twentieth of one per cent. and the case is thus brought directly within the maxim, expressio unius est exclusio alterius.*”

From these authorities the rule is well established that where a municipality is given authority to incur an extraordinary debt and no provision is made for the payment thereof, the ordinary method of providing funds to meet such obligations—to-wit, taxation, is proper and the limitations imposed upon the taxing power of municipalities for the raising of revenues to carry on the ordinary municipal functions have no application.

“Power in a municipal corporation to borrow money and issue bonds therefore implies power to levy a tax for the payment of the obligation that is incurred, unless the contrary clearly appears.”

*City of Ottawa v. Carey*, 108 U. S. 109;  
27 Law. Ed. 669.

We fully agree with counsel for the appellee, as stated by him in his brief at page 7 thereof that

“A statute authorizing a municipality to issue bonds ‘in any amount’ will be construed to mean any amount within the constitutional or statutory limit and therefore not in conflict with it.”

The question now before the court has not reference to the amount of bonds the Town of Petersburg desires to dispose of and the authorities presented by the appellee on this point of the argument do not apply to the point now under consideration.

The second question presented by the appellee is

## II.

HAS THE TOWN OF PETERSBURG AUTHORITY TO SELL ELECTRIC CURRENT AND POWER TO BE USED AND CONSUMED OUTSIDE THE CORPORATE LIMITS OF THE TOWN?

At the outset it may be said that it is fully agreed by the Town of Petersburg that it has no authority to engage in a general business of generating and selling electric light and power. But it has Congressional authority to *construct and install a municipal electric light and power plant*. The electric light and power plant shall be a “municipal plant” to be used by and for the municipality

and those residents and inhabitants constituting, as it were, the municipality.

Suppose that the most extreme view that can be taken of appellee's claim, is considered and that it were alleged in the complaint that the Town of Petersburg has threatened and proposes to sell all of its municipally generated light and power to people residing outside the corporate limits, would that be any reason to enjoin the issuance of the bonds? We think not. If the municipality threatened such a proceeding any interested citizen could step into a court of justice and enjoin the City from doing the threatened act.

What may be done with the plant and its product after its construction, is a matter that cannot now be foreseen and it cannot be anticipated that any common council of the future will attempt to deprive the municipality of the right to enjoy the current and power generated by the municipal plant.

There is an allegation in the complaint that the city will sell a substantial portion of the electric energy generated in its plant for use outside of the city limits, but does not recite whether it will sell its surplus electric power after the city has been fully supplied with power and light, or whether it will dispose of power to the detriment of the inhabitants, its customers within the city. The allegation is that it proposes to and will sell a substantial portion of its power outside the city limits.



It would seem that if the purpose of an electrical plant is to supply the individuals of a municipal corporation with light and power and, in the generation of electricity for its consumers within the city, should a surplus of light or power be generated, the municipal authorities may sell such surplus for use without the corporation. Common sense dictates that the surplus should not be allowed to run to waste and, as a matter of business, it would seem to be the duty of the municipal authorities to secure all the revenue possible from its plant provided that the primary purpose of supplying the inhabitants of the city had been fulfilled and no expense by way of extensions or enlargements of its plant with a view to supplying power to parties outside the corporate limits be incurred.

While it is generally held that a municipality has no implied authority to furnish light or power beyond its territorial limits, yet many well considered cases hold that having acquired energy in the shape of light and power for municipal purposes in excess of its present corporate needs, it is its duty to apply the surplus for the benefit of its inhabitants.

“If the municipality may built its own light plant it ought to be permitted to sell the surplus of its product as it would be to sell any of the horses bought for its fire department when they are no longer needed in the public

service, or to sell anything else it rightfully had, but had no further use for."

*Overall vs. City of Madisonville*, 102 S. W. 278; 12 L. R. A. N. S. 433.

"The contention of counsel is (for the City) that municipal corporations hold all that part of public utilities which they cannot apply to customary municipal uses in trust to waste. This Court held and was sustained by the Supreme Court of the United States, that if a corporation necessarily acquires for the conduct of its business facilities whose entire capacity is not needed for its corporate use, it is not required to hold them in idleness, but has the power and it is its duty, to lease or otherwise apply the surplus for the benefit of its stockholders."

*Pike's Peak Power Co. v. City of Colorado Springs*, 105 Fed. p. 1 (8th Crt. Ct.)

And a municipal corporation, under similar circumstances, has the same powers and duties as a private corporation.

*Mulligan v. Miles City*, 153 Pac. 276.

"The City may lawfully lease for private purposes, any excess of water not required for its waterworks."

*State v. City of Eau Claire*, 35 N. W. 529.

To the same effect:

*Rogers v. Wirkluk* 94 S. W. 24;

*Colorado Springs v. Colorado City*, 94 Pac. 316;

*Henderson v. Young*, 83 S. W. 583.

The appellee in his opening brief is fearful lest "a tax payer might own an establishment in the city upon which he is paying taxes for the '*retirement of the bonds*' and he might require power which the city could not supply on account of demands made upon it by outside consumers under contracts or agreements with the city."

There is here an admission that even if such unlawful use and disposition of power and light were contemplated by the Town of Petersburg, the issuance and sale of the bonds for the construction of the plant would be perfectly good and any purchaser of such bonds would have a good cause of action against the city in case of failure to pay interest or redeem the bonds when they mature, and such bonds would be good and valid even though the city council of Petersburg should, not only sell and dispose of power to outsiders but even go so far in the dereliction of its duties as to discriminate against the inhabitants of the town. The remedy of the inhabitants is plain. They would enjoin their council from carrying out any such illegal acts and an injunction would rightfully and promptly issue.

Counsel for the appellee, to sustain his contention, refers to the case of

*Farrell v. City of Seattle*, 86 Pac. 217.

An examination of this case discloses that this was an action to enjoin the City of Seattle from entering into contracts to furnish water to the City of Ballard. The appeal was from an order of the

lower court sustaining the demurrer to the complaint.

The complaint in that case set forth that the City of Seattle had entered into a binding contract with the City of Ballard to furnish the latter municipality with water. The City of Seattle had "sought to bind itself continuously and uninterruptedly" to furnish a definite quantity of water to the City of Ballard, and that "in order for the City of Seattle to comply with the terms of its said agreement it became necessary for this City to expend, and that it did expend, large sums of money in *extending and building* its water mains beyond and without the city limits, *and for the sole and only purpose of delivering water outside of the corporate limits of the City of Seattle.*

It was further alleged that the City of Seattle was about to enter into further contracts with the City of Ballard whereby the former city bound itself to *further extent* its water system beyond and outside its corporate limits and *within the* corporate limits of the City of Ballard, and that, if further extensions are ordered and made the necessary funds will be misappropriated.

A general demurrer to the complaint was sustained.

Upon this state of facts the Supreme Court overruled the lower court and held that the complaint did state a good cause for action.



We find no fault with this ruling. In the Seattle case the City authorities had expended and were about to expend a large amount of municipal money "solely for the sole and only purpose" of delivering water outside the city limits. In the case at bar there is no allegation in the complaint that the City of Petersburg proposes to expend one cent for the purpose of selling light or power outside the municipal boundaries.

In the Seattle case the City absolutely bound itself to furnish water to an outside municipality. In the case at bar there is no allegation that the Town of Petersburg has bound itself to do anything. There is a simple allegation that the Town of Petersburg "proposes to sell" to outsiders. We submit the two cases can readily be distinguished.

The remaining question raised by the appelle is

### III.

HAS THE TOWN OF PETERSBURG AUTHORITY TO BIND ITSELF TO PAY THE BONDS BEFORE THE EXPIRATION OF THE PERIOD PRESCRIBED IN THE ACTS OF CONGRESS AUTHORIZING THEIR ISSUANCE?

Appelle, under this heading, complains about the creation of a sinking fund;

Ordinance No. 64, of the Town of Petersburg, provides that a sinking fund shall be created and

that a sufficient tax levy shall be made to cover the interest on the bonds, as the same comes due, and also to provide sufficient funds wherewith to redeem the bonds at the rate of five thousand dollars per year after the first five years.

The acts of Congress particularly provide that interest on the bonds shall be paid semi-annually and that the bonds must be redeemed within twenty years and in express terms gives the Municipality the right to redeem them serially, at the rate of not to exceed five thousand dollars per annum after the first five years. The Town of Petersburg has taken advantage of this optional provision and by its ordinance No. 64 has provided that five thousand dollars principal of the bonds shall be paid off every year after the first five years.

It is true that the acts of Congress do not provide for a sinking fund, nor do they provide for the levy of a tax on property within the municipality. Congress, by its acts, authorizes the contracting of the indebtedness for certain definite purposes stated, and provided no method for the payment of this indebtedness.

We have already shown (under the first point raised by appellant), that the method and means to be used for such repayment were impliedly left to the municipal authorities. As was said in *Halls County Court vs. Douglas*, 105 U. S. 733 "in such a case, the power to tax is necessarily an ingredient

*of the power to contract. When authority is granted by the legislative branch of the government to a municipal or subdivision of a state to contract an extraordinary debt by the issue of negotiable securities, the power to levy a tax sufficient to meet at maturity the obligation so incurred, is conclusively implied unless the law which confers the authority or, some general law in force at the time, clearly manifests a contrary intention."*

In addition to the authorities cited under the first section of our argument herein, we cite the following:

*Ottawa v. Carey*, 108 U. S. 122;

*Quincy v. Jackson*, 113 U. S. 337;

*Scotland v. Hill*, 140 U. S. 44;

*Brackenridge v. McCracken*, 61 Fed. 196;

*Rose v. McKie*, 145 Fed. 590;

*United States v. Saunders*, 124 Fed. 128.

It must be clear that the authority for the common council to create such a fund is implied by the act. If the power to tax is a necessary ingredient of the power to contract an indebtedness of the nature before us, the power to provide for the raising of the tax is implied.

That Congress had in view the progressive redemption of the bonds is certain since in the act it is provided that the common council might reserve to itself the right of redemption at the rate of

\$5,000 annually after five years from the date of issue of the bonds. This option, having been exercised by the common council, it is clear that a fund for such redemption must be provided for, and that such fund, if the option was exercised, was in contemplation by Congress. There is also abundant authority for the proposition that in such case the power to create a sinking fund is implied.

*A statute authorizing a bond issue need not itself make provision for a sinking fund; the power is impliedly conferred.* McQuillen on MUNICIPAL CORPORATIONS, Vol. V, Sec. 2345. Note.

*Vallely v. Park Commissioners*, 111 N. W. 615;

*First National Bank v. Swenson*, 210 Pac. 900;

*Abbott on "MUNICIPAL CORPORATIONS,"*  
Secs. 224-305.

The provision for a tax levy to meet the annual expenses incorporated in the ordinance as well as the sinking fund for the gradual redemption of the authorized indebtedness is, as the Lower Court in its opinion says: "a meritorious precautionary measure impliedly authorized by the Congressional Act permitting the bond issue."

"Bonds were to be redeemed within that time (30 years) *at the pleasure* of the County Court. It appears that the bonds are to run not more than twenty years and the court has fixed the time for their redemption after six years and within twenty years; a certain num-



ber of them falling due the 6th year and certain others each succeeding year thereafter until the 20th year. This is the exercise of the "*pleasure of the court.*"

*Turpin v. Madison Co. Crt.*, 48 S. W. 1085.

We respectfully submit that the contentions of the appellant are not well founded, and that the judgment of the lower court, sustaining the defendant's demurer to the complaint, should be affirmed.

Respectfully submitted,

HENRY RODEN,

Attorney for Appellee.

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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THE BLUM-O'NEILL COMPANY, a Corporation,  
Plaintiff in Error,  
vs.  
F. J. SULLIVAN,  
Defendant in Error.

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**Transcript of Record.**

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Upon Writ of Error to the United States District Court  
of the Territory of Alaska, Third Division.

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Assignment of Errors .....	206
Bill of Exceptions .....	1
Certificate of Clerk U. S. District Court to Transcript of Record .....	235
Citation on Writ of Error.....	231
Complaint .....	3

## DEPOSITION ON BEHALF OF DEFEND- ANT:

ALLEN, DUDLEY G. ....	137
-----------------------	-----

## EXHIBITS:

Plaintiff's Exhibit "A" — Seed X-ray Plate .....	157
Plaintiff's Exhibit "B"—Map .....	158
Defendant's Exhibit No. 1 — Order for Groceries Sold by Blum-O'Neill Com- pany to Carlisle Pak. Co. ....	161
Instructions of Court to Jury .....	142
Judgment .....	198
Minutes of Court—June 6, 1923—Order Deny- ing Motion for New Trial.....	180

Index.	Page
Minutes of Court—June 21, 1923—Order Ex- tending Time Sixty Days to Settle Bill of Exceptions . . . . .	200
Motion for Directed Verdict . . . . .	140
Motion for New Trial . . . . .	164
Names and Addresses of Attorneys of Record.	1
Opinion on Motion for a New Trial . . . . .	181
Order Allowing Writ of Error . . . . .	223
Order Amending Minute Order . . . . .	201
Order Denying Motion for New Trial . . . . .	180
Order Extending Time Sixty Days to Settle Bill of Exceptions . . . . .	200
Order Settling and Certifying Bill of Excep- tions . . . . .	202
Petition for Writ of Error . . . . .	205
Praecipe for Transcript of Record . . . . .	232
Reply . . . . .	16
Second Amended Answer . . . . .	7
Supersedeas and Cost Bond on Writ of Error..	225
TESTIMONY ON BEHALF OF PLAIN- TIF:	
BULKLEY, J. L. . . . .	81
Cross-examination . . . . .	86
SATTERLEE, BETTY . . . . .	75
Cross-examination . . . . .	79
Recalled . . . . .	138
Cross-examination . . . . .	139
SULLIVAN, F. J. . . . .	21
Cross-examination . . . . .	42

## Index.

Page

TESTIMONY ON BEHALF OF DEFEND-  
ANT:

FREDERICKSON, FRED .....	109
Cross-examination .....	121
KAVANAUGH, W. J. ....	130
Cross-examination .....	132
LUND, HAROLD .....	124
Cross-examination .....	128
O'NEILL, H. I. ....	89
Cross-examination .....	104
Transcript of Evidence .....	19
Trial Continued .....	15
Verdict .....	163
Writ of Error .....	229





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In the District Court for the Territory of Alaska,  
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,  
Defendant.

**Bill of Exceptions.**

Comes now the Blum-O'Neill Company, a corporation, the defendant above named, and being about to prosecute out of the United States Circuit Court of Appeals for the Ninth Circuit a writ of error to review the judgment made, rendered and entered by the above-named District Court in the above-entitled cause on June 21, 1923, does pray

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\*Page-number appearing at foot of page of original certified Transcript of Record.

an order of said District Court, or of the Honorable E. E. Ritchie, Judge thereof, who presided at the trial of said cause and who made and rendered the aforesaid judgment, that this bill of exceptions containing the following named papers, pleadings, proceedings and exceptions in said cause be filed, settled and certified to as said defendant's bill of exceptions upon such writ of error, to wit:

1. Complaint.
  2. Second amended answer.
  3. Minute order made February 21, 1923, permitting defendant to file second amended answer.
  4. Reply.
  5. Transcript of testimony and of the proceedings had upon the trial of the action.
  6. Plaintiff's original exhibits "A" and "B."
  7. Copy of Defendant's Exhibit No. 1.
  8. Verdict.
  9. Defendant's motion for a new trial.
  10. Minute order denying motion for a new trial.
  11. Opinion of court on motion for new trial.
  12. Judgment.
  13. Order granting defendant sixty days from date of judgment to prepare, file and settle bill of exceptions on writ of error, and fixing supersedeas and cost bond in amount \$3,000.
- [2]

Full, true and correct copies of all which said papers, pleadings, exceptions and proceedings, and the originals of said Plaintiff's Exhibits "A" and

“B,” are hereto attached and by reference incorporated in and made a part of this bill of exceptions.

And said defendant prays that the said judgment of said District Court made, rendered and entered herein on the 21st day of June, 1923, in favor of plaintiff and against defendant may be reversed and set aside.

Dated at Valdez, Alaska, July 3, 1923.

DONOHUE & DIMOND,  
Attorneys for the Defendant. [3]

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In the District Court of the Territory of Alaska,  
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,  
Defendant.

### **Complaint.**

The plaintiff complains of defendant and alleges:

#### **I.**

That defendant is now and at all times mentioned herein has been a corporation, duly incorporated under and pursuant to the laws of the Territory of Alaska, and engaged in the general merchandise business at Cordova in the Territory of Alaska:

#### **II.**

That on the 4th day of May, 1922, and for some



time previous to said date, Fred Fredrickson was in charge of the warehouse of defendant corporation and was authorized by defendant to superintend the shipment of all goods from said warehouse and to exercise authority for and on behalf of defendant corporation over the employees of said defendant corporation working in said warehouse and over those delivering goods from said warehouse.

### III.

The plaintiff, on the said 4th day of May, 1922, was employed by defendant as deliveryman whose business it was to obtain and deliver goods from the warehouse of defendant above mentioned, under the orders and direction of the above-named Fred Frederickson.

### IV.

That on the said 4th day of May, 1922, by direction of the above-named Fred Frederickson, plaintiff abandoned the sled which he had been using for the delivery of groceries from said warehouse, [4] hitched the defendant's horse which plaintiff was driving in the course of his employment, to a delivery wagon. That there was still snow and ice on the streets and that the street which lies in front of the building then being used as defendant's warehouse, namely, B Avenue, was covered with ice and snow from a distance of twenty feet from the door of defendant's said warehouse down a steep grade to the intersection of First Street, a distance of about one hundred feet.

### V.

That on said 4th day of May, 1922, at the order of

said Fred Frederickson, plaintiff backed said delivery wagon up to the door of said warehouse for the purpose of taking a load of groceries to the main store of plaintiff. That when said wagon was full and no more could be safely placed thereon, plaintiff started to drive away. That when plaintiff had proceeded about twenty feet from the said warehouse door, said Frederickson called for him to stop and against the remonstrances of plaintiff, piled seven cases of milk and eggs on and in front of the seat of said wagon. That by reason of the placing of said additional cases of produce on said wagon, plaintiff had no safe place to sit nor had he any safe place from which to control the said horse of defendant. That plaintiff so informed the said Frederickson, agent of defendant as above stated, but said Frederickson said that the goods would have to go. Before plaintiff could get down from the wagon or remove himself to a safe place, said horse started down said hill and the boxes piled in the front of said wagon by said Frederickson slid forward and over the dashboard striking the horse and causing him to become frightened and to run at great speed down said hill turning into First Street and throwing plaintiff from said wagon in front of the wheels of said wagon which passed over plaintiff's leg and caused same to be broken and mangled.

#### VI.

That the injury of plaintiff was caused by the carelessness and negligence of defendant and its agent as above set forth. [5]

## VII.

That as a result of the carelessness and negligence of defendant, plaintiff suffered a compound fracture of his leg and was confined to his bed from the 4th day of May, 1922, to the 22d day of June, 1922, and since said date has been compelled to use crutches. That thereby plaintiff has been compelled to pay doctor and hospital bills to the amount of \$418.00, has suffered the loss of wages to the amount of \$490.00 up to the date of this complaint, is informed and believes that it will be impossible for him to do any work for at least three months longer to his damage in the sum of \$150 per month or \$450.00, that he will be crippled for at least a year from the date of his said injury and has suffered pain and anguish to his damage in the sum of five thousand dollars.

WHEREFORE plaintiff prays judgment against defendant in the sum of Six Thousand Three Hundred and Fifty-eight dollars and for his costs and disbursements herein.

FRANK H. FOSTER,  
Attorney for Plaintiff.

United States of America,  
Territory of Alaska,—ss.

F. J. Sullivan, being first duly sworn, on oath deposes and says that he is the plaintiff named in the foregoing action; that he has read the above complaint, knows the contents thereof and that the same is true.

F. J. SULLIVAN.

Subscribed and sworn to before me this 8th day of September, 1922.

[Notarial Seal]

FRANK H. FOSTER,

Notary Public.

My Com. ex. April 6, 1923.

Filed in the District Court, Territory of Alaska,  
Third Division. Sep. 15, 1922. W. N. Cuddy, Clerk.  
By ———, Deputy. [6]

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In the District Court for the Territory of Alaska,  
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

**Second Amended Answer.**

Comes now the above-named defendant and for answer to plaintiff's complaint on file herein admits, denies and alleges as follows, to wit:

**I.**

Referring to the 1st paragraph of said complaint defendant admits each and all of the allegations therein contained.

**II.**

Referring to the 2d paragraph of said complaint



defendant denies each and every allegation therein contained.

### III.

Referring to the 3d paragraph of said complaint, defendant admits that on the 4th day of May, 1922, the plaintiff was employed by defendant as a deliveryman whose business it was to obtain and deliver goods from the warehouse and store of said defendant; and defendant denies each and every other allegation in said paragraph contained.

### IV.

Referring to the 4th paragraph of said complaint, defendant admits that on the 4th day of May, 1922, plaintiff used a wagon for the delivery of merchandise from defendant's warehouse situated on B Avenue between First and Second Streets in the town of Cordova, Alaska. Defendant further admits that B Avenue was covered with snow and ice for a part of the distance between the door of said [7] warehouse and the place of the intersection of B Avenue and First Street; and defendant denies each and every other allegation in said paragraph contained.

### V.

Referring to the 5th paragraph of said complaint, defendant denies each and every allegation therein contained except as hereinafter stated.

### VI.

Referring to the 7th paragraph of said complaint, defendant denies each and every allegation in said paragraph contained.

## VII.

Referring to the 7th paragraph of said complaint, defendant admits that plaintiff suffered a fracture of his leg and was confined to his bed between the approximate dates herein mentioned; and as to the other allegations of plaintiff's complaint, defendant has no knowledge or information on which to form a belief, and therefore denies the same and all thereof.

## FIRST AFFIRMATIVE DEFENSE.

And for a further answer and by way of affirmative defense to the matters and things alleged in plaintiff's complaint defendant alleges:

## I.

That during all the times herein mentioned defendant was, and now is, a corporation duly organized and existing under the laws of the Territory of Alaska. That defendant has paid all licenses and taxes last due to the Territory of Alaska, including the license tax last to become due to said Territory.  
[8]

## II.

That for many years last past the defendant has been, and now is, engaged in the sale of merchandise at retail in the town of Cordova, Alaska. The defendant's store at which said business is carried on is situated at the corner of First and C Streets in said town of Cordova. That the defendant also has under lease a warehouse which is situated in the basement of the building located on Second Street and B Avenue in said town. That said warehouse opens on B Avenue near the alley which runs through the block and intersects C Street between

First and Second Streets. That the street in front of said warehouse is quite steep having a gradient of approximately ten per cent from the horizontal.

### III.

That on the 4th day of May, 1922, the plaintiff was, and for a long time prior thereto he had been, in the employ of defendant as a deliveryman and it was the duty of plaintiff under his employment, to haul merchandise from the store and warehouse of defendant, as above described, to other places in and around the town of Cordova, Alaska, such merchandise was usually hauled in automobiles, or on sleds or wagons furnished by defendant. That on the 4th day of May, 1922, and at all other times while plaintiff was so employed by defendant, the defendant did not control, or attempt to control, the plaintiff in the mode or manner in which he did his work, it being the plaintiff's duty and business under his said employment to transport said merchandise over such route by such method and in such manner as to him should seem safest and best.

### IV.

That on the said 4th day of May, 1922, the plaintiff was directed by the defendant to transport some merchandise from defendant's said warehouse to some other place or places in the town of Cordova. That plaintiff accordingly went to said warehouse with defendant's horse and wagon and with the assistance of the said [9] Fred Fredrickson, another employee of defendant, who was a fellow-servant of plaintiff, loaded the merchandise on said wagon. That at this time a portion of B Avenue

between the door of said warehouse and First Street in the town of Cordova was covered with ice and snow while the portion of B Avenue between the door of said warehouse and Second Street was clear and dry and could be safely traveled and plaintiff could readily and easily and safely have driven the horse, which was pulling the wagon containing said merchandise, from the door of said warehouse up B Avenue to Second Street, without any appreciable loss of time and without any extra labor. That on this date the said Fred Fredrickson had suggested to plaintiff that the merchandise taken from said warehouse be hauled that way, that is from the door of said warehouse up B Avenue to Second Street and thence to the place of delivery, but the plaintiff when his wagon was loaded with said merchandise, disregarding said advice, started to drive down B Avenue toward First Street, and the wheels on one side of the wagon cut through the soft snow thus tipping up the wagon so that a part of the merchandise fell out, whereupon plaintiff also sprang, fell or was thrown from said wagon, but plaintiff fell entirely clear of said wagon and after said wagon had passed him ran alongside of said wagon and in an attempt to get on said wagon plaintiff fell and one of the wheels of said wagon passed over plaintiff's leg breaking it, this being the same injury complained of in plaintiff's complaint herein.

V.

That on May 4, 1922, plaintiff was entirely and thoroughly familiar with the conditions of said B Avenue and the other streets in the town of Cor-



dova, Alaska, and knew, or should have known by the exercise of a reasonable degree of observation, of the risks and dangers attendant upon driving a loaded wagon down [10] B Avenue between the door of said warehouse and First Street, and the injuries which plaintiff then sustained were caused solely by his own negligence and lack of care, and not by any negligence, fault or lack of care on the part of the defendant.

### SECOND AFFIRMATIVE DEFENSE.

And for a second affirmative defense to the matters and things alleged in plaintiff's complaint, defendant alleges:

#### I, II, III and IV.

Defendant hereby refers to paragraphs I, II, III and IV of its first affirmative defense to plaintiff's complaint, hereinbefore set forth, and by reference adopts the same as paragraphs I, II, III, and IV of this, its second affirmative defense to said complaint.

#### V.

That on May 4, 1922, the plaintiff was entirely and thoroughly familiar with the conditions of said B Avenue and the other streets in the town of Cordova, Alaska, and knew, or should have known by the exercise of a reasonable degree of observation, of the risks and dangers attendant upon driving a loaded wagon down B Avenue between the door of said warehouse and First Street, and the injuries which the plaintiff then sustained were caused by his own negligence and lack of care, and by the risks of plaintiff's employment of which he knew, or

should have known by the exercise of a reasonable degree of observation and which he assumed.

### THIRD AFFIRMATIVE DEFENSE.

And for a third affirmative defense to the matters and things alleged in plaintiff's complaint, defendant alleges:

#### I.

That during all the times herein mentioned defendant was, and now is, a corporation duly organized and existing under the laws of the Territory of Alaska. That defendant has paid all license and [11] taxes due to the Territory of Alaska, including the license tax last to become due to said Territory.

#### II.

That during all of the times mentioned in plaintiff's complaint, and in this answer, the said Fred Fredrickson was an employee of the defendant and a fellow-servant of the plaintiff and that said defendant had not at any time, or in any manner, delegated to the said Fred Fredrickson the right, power or authority to perform any of the duties or obligations owed by defendant to said plaintiff; and if the injuries sustained by plaintiff, as alleged in plaintiff's complaint, were in any manner caused by or due to the negligence of the said Fred Fredrickson, which the defendant does not admit but expressly denies, then such injuries were caused by and due to the negligence of a fellow-servant of plaintiff in his said employment and for which defendant is not liable. That during all of said time the said Fred

Fredrickson was a fellow-servant of plaintiff and not the vice-principal of defendant.

WHEREFORE, defendant prays that plaintiff take nothing by reason of his complaint, and that the same be dismissed, and that defendant recover of plaintiff his costs and disbursements herein incurred.

DONOHOE & DIMOND,

Attorneys for the Defendant. [12]

United States of America,  
Territory of Alaska,—ss.

H. I. O'Neill, being first duly sworn, upon his oath says: I am the vice-president of the Blum O'Neill Company, the defendant named in the foregoing answer. That I have read said answer and know the contents thereof, and I believe the same to be true.

H. I. O'NEILL.

Subscribed and sworn to before me this 20th day of February, 1923.

[Notarial Seal]

FRANK J. HAYES,

Notary Public for Alaska.

My commission expires May 21, 1925.

Service of the foregoing answer by receipt of copy thereof acknowledged, and verification thereof at this time waived this 19th day of February, 1923.

FRANK H. FOSTER and

L. V. RAY,

Attorneys for the Plaintiff.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 21, 1923. W. N. Cuddy, Clerk. By S. N. Scott, Deputy. [13]

In the District Court for the Territory of Alaska,  
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,  
Defendant.

**Trial Continued.**

Now on this day the trial of this cause was resumed, the plaintiff being present in person and represented by Messrs. Frank H. Foster and L. V. Ray; the defendant being represented by Messrs. Donohoe & Dimond.

WHEREUPON roll-call of the jurors in the box showed all present.

**MINUTE ORDER.**

On stipulation between counsel for the plaintiff and the defendant, in open court, it is

ORDERED that the defendant may file its second amended answer in this cause.

(Copied from Court Journal No. 13, February 21, 1923, 17th Court Day.) [14]



In the District Court for the Territory of Alaska,  
Third Division.

No. —.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,  
Defendant.

**Reply.**

Comes now the above-named plaintiff and as a reply to the affirmative matter contained in defendant's answer on file herein admits, denies, and alleges as follows, to wit:

Answering defendant's first affirmative defense:

I.

As to Paragraph One of defendant's affirmative defense, plaintiff has not sufficient information upon which to base a conclusion and, therefore, denies the same.

II.

Answering Paragraph Two of defendant's first affirmative defense, plaintiff admits the same and the whole thereof.

III.

Answering Paragraph Three of defendant's first affirmative defense, plaintiff admits the same and the whole thereof.

IV.

Answering Paragraph Four of defendant's first

affirmative defense, plaintiff admits the first seven lines with the exception of the statement in line 7 that Frederickson was a fellow-servant of plaintiff, and plaintiff alleges that Frederickson was a vice-principal.

Answering that sentence commencing on line 8 and ending on line 16, plaintiff alleges the fact to be that the street above the door of said warehouse was also covered with [15] snow and ice, and that it was impossible for the wagon in the condition in which it was at that time, as to being heavily laden, to have been pulled by the said horse up the hill to Second Street.

Answering the remainder of said fourth paragraph, plaintiff denies that said Frederickson made any suggestion to plaintiff in regard to pulling said merchandise up the hill to Second Street, and denies that the accident was caused by the wheels cutting through soft snow, but alleges that said accident took place through the overloading of said wagon, as set forth in plaintiff's complaint. Any other affirmative matter contained in said fourth paragraph is hereby denied.

#### V.

As to Paragraph Five, plaintiff admits that on May 4th, 1922, he was familiar with the condition of said B Avenue and the other streets in the town of Cordova, Alaska, and alleges that the course which he took in driving down B Avenue would have been safe if said wagon had not been overloaded and improperly loaded by Frederickson contrary to plaintiff's objection and expostulations, as stated in

plaintiff's complaint. Plaintiff denies that the injuries which he sustained were caused of his own negligence and lack of care and states that such injuries were caused by the fault and lack of care on the part of the defendant.

#### REPLY TO SECOND AFFIRMATIVE DEFENSE.

Replying to the second affirmative defense set forth in defendant's answer, plaintiff hereby refers to Paragraphs One, Two, Three, and Four of his reply to defendant's first affirmative defense as hereinbefore set forth, and by reference adopts the same as Paragraphs One, Two, Three, and Four of this, his reply to plaintiff's second affirmative defense. [16]

#### V.

Plaintiff admits that on May 4, 1922, he was entirely and thoroughly familiar with the conditions of said B Avenue and the other streets in the town of Cordova, Alaska, and denies each and every other statement contained in said paragraph.

WHEREFORE plaintiff prays judgment as set forth in his complaint.

FRANK H. FOSTER,  
Attorney for Plaintiff.

United States of America,  
Territory of Alaska,—ss.

F. J. Sullivan, being first duly sworn, upon his oath says: I am the plaintiff named in the foregoing cause of action and I have read the above

reply and know the contents thereof and I believe the same to be true.

FLORENCE J. SULLIVAN,

Subscribed and sworn to before me this 12 day of Jan., 1923.

[Notarial Seal]      FRANK H. FOSTER,  
Notary Public for Alaska.

My commission expires April 6, 1923.

Filed in the District Court, Territory of Alaska,  
Third Division. Jan. 26, 1923. W. N. Cuddy  
Clerk. By Thos. S. Scott, Deputy. [17]

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In the District Court for the Territory of Alaska,  
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,

**Transcript of Evidence.**

BE IT REMEMBERED, That the above-entitled cause came on duly and regularly to be heard at Valdez, in the said Division and Territory, on Tuesday, February 20, 1923, before Honorable E. E. RITCHIE, Judge of said Court, and a Jury:

The plaintiff being represented by his attorneys and counsel, Frank H. Foster and L. V. Ray:

The defendant being represented by its attorneys and counsel, Donohoe & Dimond.



The jury having been empanelled and sworn, opening statements were made to the Court and jury by Mr. Foster on behalf of the plaintiff and by Mr. Donohoe on behalf of the defendant:

WHEREUPON the following additional proceedings were had and done, to wit: [18]

In the District Court for the Territory of Alaska,  
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,  
Defendant.

## INDEX TO TRANSCRIPT OF EVIDENCE.

### PLAINTIFF'S CASE.

SULLIVAN, F. J.....	1
Cross .....	20
SATTERLEE, BETTY .....	50
Cross .....	53
BUCKLEY, Dr. J. L. ....	55
Cross .....	59

### REBUTTAL.

SATTERLEE, BETTY .....	109
Cross .....	110

### DEFENDANT'S CASE.

O'NEILL, H. I. ....	63
Cross .....	76
Redirect .....	78

FREDERICKSON, FRED .....	81
Cross .....	92
LUND, HAROLD .....	96
Cross .....	99
KAVANAUGH, W. J.....	102
Cross .....	104
ALLEN, DUDLEY G. ....	106
Motion for Nonsuit.....	61
Motion for Instructed Verdict.....	111

# EXHIBITS.

Plaintiff's "A"—X-Ray Photo.....	19
"B" Map .....	111
Defendant's 1—Order 5-4-22 .....	72

[19]

## Testimony of F. J. Sullivan, in His Own Behalf.

F. J. SULLIVAN, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination by Mr. FOSTER.

Q. What is your name? A. Florence Sullivan.

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Where do you reside. A. Anchorage.

Q. Where did you live last May? A. Cordova.

Q. Territory of Alaska, Third Division?

A. Yes, sir.

Q. Where did the events take place that are complained of in your complaint? A. Cordova.

Q. On May 4th last? A. Yes, sir.

Q. Now what is your occupation?

(Testimony of F. J. Sullivan.)

A. I was then deliveryman for the Blum-O'Neill Company.

Q. How long were you deliveryman for the Blum-O'Neill Company?     A. At that time?

Q. How long have you worked for the Blum-O'Neill Company altogether?

A. I worked for three and a half years for S. Blum & Company and one year and eight months for the Blum-O'Neill Company.

Q. For the Blum-O'Neill Company when did you first start work?

A. The latter end of September, 1918.

Q. Where did you work?

A. Cordova, Alaska. [20—2]

Q. In what place?

A. I was working in the warehouse under Fred Frederickson.

Q. This Fred Frederickson is the same man whom you claim you were working under at the time the accident took place?     A. Yes, sir.

Q. At that time where was Frederickson working?

A. He had charge of the warehouse, retail and wholesale, shipping—

Mr. DONOHOE.—Just a minute: I ask that the witness just answer the question.

The COURT.—Yes, you should only answer the question.

Q. Who was foreman or boss of the warehouse?

Mr. DONOHOE.—We object to the question as

(Testimony of F. J. Sullivan.)

too indefinite as to time. What took place in 1918 has nothing to do with what took place in 1922.

The COURT.—Yes, it should be confined to the time of the accident.

Mr. FOSTER.—Your Honor, I wish to show that in 1918 a certain condition existed which is presumed to have continued.

Mr. DONOHOE.—It is not presumed.

The COURT.—No, Mr. Foster, I don't agree with you. The conditions at the time this happened should be within the personal knowledge of the plaintiff. Objection sustained. Exception allowed.

Q. During the year 1918 when you were working there what occupation did you follow?

Mr. DONOHOE.—We object to the question as too remote from the accident complained of.

Mr. FOSTER.—I want to show the plaintiff's knowledge of the conduct of the business of the defendant, upon which is based the claim that Fredrickson was a vice-principal. [21—3]

Mr. DONOHOE.—We can't go back to the year one to go over that. This is four years previous to the occurrence of this accident.

The COURT.—Objection sustained. Exception allowed.

Q. Were you working in the warehouse in your former employment in 1918 and 1919?

Mr. DONOHOE.—Same objection, too remote.

The COURT.—Objection sustained. Exception allowed.

Mr. FOSTER.—As illustrative of the testimony



(Testimony of F. J. Sullivan.)

only and not to be admitted in evidence I would like to offer this plat.

Mr. DONOHOE.—I have no objection to the plat with the exception of the markings of twelve and eight per cent grade.

The COURT.—It will be admitted as an approximate illustration.

Q. During the year after your first employment, 1918–1919, was there a space of time between that and your last employment?     A. Yes, sir.

Q. How long?

A. From October, 1919, until 1921, October.

Q. In October, 1921, you went to work on your last employment?     A. 1922.

Q. You mean 1921?     A. Yes.

Q. When you went to work in October, 1921, who was in charge of the warehouse department?

A. Mr. Frederickson.

Q. Fred Frederickson?     A. Yes.

Q. What was your duties?

A. Deliveryman. [22—4]

Q. Was there a notice posted near the telephone in the warehouse at the time you went to work, signed by the Blum-O'Neill Company, by its president, in which Mr. Frederickson was designated as superintendent in charge?

Mr. DONOHOE.—I object to that question as put in this way. It is not a fair question and it is not admissible in my opinion.

The COURT.—The question is leading.

(Testimony of F. J. Sullivan.)

Q. All right, I will just ask him whether there was any notice posted up there.

A. Yes, sir, there was.

Q. Where was it posted?

A. In the middle of the warehouse on a post.

Q. By whom was it signed?

A. I think it was signed M. Brock, by the Blum-O'Neill Company. It was there in 1918 and 1919.

Mr. DONOHUE.—I move at this time to strike out the testimony on the ground that there is no date fixing the time when he saw the notice.

The COURT.—The testimony about it being there in 1918 and 1919 will be stricken. The remainder will stand if he fixes the date. Exception allowed.

Q. While you were working for the Blum-O'Neill Company in the warehouse department on what date was this notice posted. In the first place, as far as you know, was it posted while you were working there?

A. It was on or about the 25th of December, 1918; the first time after Mr. Clark went outside; after the foreman went out.

Q. And when did you see the notice last, to your recollection?

A. I couldn't state that. I saw it so often I couldn't put a date on it. While it was there I saw it every day. [23—5]

Q. Do you remember seeing it since your last employment? A. Yes, sir.

Q. And what did the notice state?

(Testimony of F. J. Sullivan.)

Mr. DONOHOE.—We object to the question as not calling for the best evidence. Why don't you produce the notice?

Mr. FOSTER.—Well, it's in your possession and we make a demand on you for it.

The COURT.—The demand should have been made earlier.

Mr. DONOHOE.—It is clear it is impossible for us to comply with that request now. Why, here we are 100 miles from where the notice was supposed to be.

The COURT.—The objection is sustained. Exception allowed.

Mr. DONOHOE.—I have the further objection to offer to this line of testimony, that it is not within any issue joined by the pleadings. The complaint in itself has never set up that Frederickson was a vice-principal by reason of being a superintendent or manager of a separate department, which is absolutely necessary to plead, and until Mr. Foster made his opening statement I had no idea as to what he was going to rely upon.

The COURT.—I don't agree with you as to that, Mr. Donohoe.

Q. Do you know whether that notice that you have testified about was put up, was there at the time you were hurt? Do you know whether it continued to be posted that long?

A. I can't say that, Mr. Foster.

Q. You don't know? A. No, sir.

Q. At this time the plaintiff offers to show by

(Testimony of F. J. Sullivan.)

this witness what the notice contained. Mr. Sullivan, what—

Mr. DONOHUE.—We object to the witness testifying to the contents of any notice.

The COURT.—I am not making a final ruling at this time. At this time it is not admissible. Exception allowed. [24—6]

Mr. DONOHUE.—We have a further objection to make and that is on the ground that it is too remote. The witness has just testified that he didn't know whether it was up there at the time of the accident or not. Also object to the offer orally to prove the contents of this notice.

Q. When did you see the notice last?

A. I can't tell what day. I have seen it several days while working there.

Q. Can you say there was any time when the notice was not there? A. I cannot.

Q. You don't know?

A. I don't. It might be there yet. I never took notice of it toward the last.

Q. This warehouse department that you call it; what did that consist of?

A. General merchandise.

Q. Will you take the stick and show the jury the location. This street marked Second Street; this street marked B Avenue and here First Street. What is the building on the corner of Second Street and B Avenue?

A. That is the Blum building, the warehouse.

Q. The building on the other corner of the block,



(Testimony of F. J. Sullivan.)

the building on the other corner of C Avenue and First Street; what is that?

A. That is the Blum store building.

Q. What does this mark on the Blum building show; these two marks?

A. That is where we get the groceries out; that is the warehouse.

Q. What was the size of the warehouse building.

A. 100 feet long; 50x100.

Q. How many stories?

A. Three, no two stories—basement and another story.

Q. For what purpose during the month of May, 1922, was the basement used?

A. For a grocery warehouse. [25—7]

Q. Was there a counter in there?

A. Yes, sir; a big counter.

Q. Was there a cash register?

Mr. DONOHOE.—We object to these questions on the ground that they are leading. Let the witness state what was in there.

The COURT.—Yes, that would be better.

Q. What was in there besides the counter and other things you spoke of?

A. There was a general line of merchandise. There was not any hardware—it was mostly groceries. We had a retail counter on one side and the wholesale orders were also put up.

Q. And what was on the floor above that?

A. There was bedding and furniture.

(Testimony of F. J. Sullivan.)

Q. What was the system you followed there in the warehouse when you sold something?

A. We had a little box we put the cash in and the bookkeeper came up every night and took it down to the office.

Q. How much cash was taken in there approximately every day?     A. Forty or fifty dollars.

Q. Were other orders than cash orders taken there?     A. Yes, sir.

Q. Who was in charge of the warehouse?

A. Mr. Frederickson.

Mr. DONOHOE.—We object to that question as calling for a conclusion and move that the answer be stricken.

The COURT.—He may answer if he knows. It would be better if he would state his duties and who gave the orders there. Yes, I think the answer will be stricken. Exception allowed.

Q. Who gave the orders around that place?

A. Fred Frederickson. [26—8]

Q. What did he do?

A. Well he took charge of the wholesale and retail business in that warehouse and the deliverymen were supposed to do as he told them.

Mr. DONOHOE.—We object to what the deliverymen were supposed to do.

The WITNESS.—That is what they did do.

The COURT.—I don't know that that is objectionable. Overruled. Exception allowed.

Q. When the deliverymen were to deliver goods, from whom did they receive their orders?

(Testimony of F. J. Sullivan.)

A. From Frederickson.

Q. Who gave the orders in regard to the maintenance of the wagons and sleds, repairs, etc.?

A. Well, when there were sleds to be fixed Frederickson told us to take them to the blacksmith-shop to be fixed.

Q. Did you ever see Frederickson around the barn?

A. Yes, he came down to look over the barns frequently.

Q. What was your duty as regards the horses?

A. I looked after them.

Q. At the barns you mean?      A. Yes.

Q. Who gave you the feed for them?

A. Mr. Frederickson. We kept the oats in the warehouse and the hay was delivered from the dock into the barn.

Q. When you were delivering goods who, if anyone, gave directions as to the loading?

A. There was just two of us there and Mr. Frederickson gave me orders as to loading.

Q. What kind of directions or orders? [27—9]

A. Well, he directed me as to how to put on my orders to the best advantage. If he would see me loading he would tell me the best way, or say this is a better way, and tell me where to go or bring something from the warehouse some place, but he always told me to come back and where to go to afterwards.

Q. And as to the placing of the orders on the wagons?

(Testimony of F. J. Sullivan.)

A. Sometimes he helped me and most of the time I did it myself.

Q. Were you directed by anyone but Frederickson? A. By Frederickson, always.

Q. Who hired and discharged the men around the warehouse?

A. There weren't any men discharged around the warehouse except men on the short jobs and Frederickson hired and fired them. The men such as myself were hired in the main office.

Q. Do you know of any men in the office being discharged by Mr. Frederickson during your last employment? A. No, sir.

Q. Was there anyone discharged during that time? A. No, sir.

Q. No one discharged? A. No.

Q. But you say that for short jobs Frederickson hired and fired them? A. Yes, sir.

Mr. DONOHUE.—We move to strike that answer because the witness has said that during his last employment no one was employed or discharged.

The COURT.—Well, the question is leading the way it is put. You better ask another question. The answer will be stricken.

Q. In the month of May, 1922, the 4th of May, say the 3d and 4th of May, what were the weather conditions at Cordova as regards snow or sunshine?

A. It was good weather. [28—10]

Q. Was there any snow on the ground?



(Testimony of F. J. Sullivan.)

A. There was lots of snow some places; some places more than others.

Q. What vehicle had you been using in delivering goods?     A. A sled.

Q. Now, what vehicle did you use on the morning of the 4th of May?     A. A wagon.

Q. For what reason did you switch to the wagon from the sled?

A. Well, I got orders to take the wagon instead of the sled.

Q. Who told you to?     A. Mr. Frederickson.

Q. Just take a look at this map, this description. You have stated that the warehouse door is at the lower corner of the frame building, the warehouse building. What was the condition on the 4th of May, 1922, of B Street between 1st and 2d Streets as to snow?

A. Just outside of the warehouse it was not very deep but further down it was deeper, more snow.

Q. Above the warehouse, what was the condition?

A. It was bad, and on this street (indicating) it was deep snow.

Q. You mean on Second Street?     A. Yes, sir.

Q. What was the condition of the snow?

A. On Second Street I couldn't go through there at all because my wagon wouldn't go. Big teams, double teams, went through but my wagon with one horse couldn't go.

Q. What wagon did you use. What capacity wagon did you use?

(Testimony of F. J. Sullivan.)

A. About sixteen hundred or seventeen hundred pounds.

Q. And how big a horse?

A. A horse about eleven hundred pounds.

[28A—11]

Q. How wide were the tires?

A. Three-inch tires to the best of my knowledge. Three to four; not over four, narrow gauge.

Q. You mean as wide as this (indicating)?

A. No, three-inch.

Q. Do you appreciate how wide three inches is, Mr. Sullivan?

A. Well, you know what narrow wheels are.

Q. On the 4th of May when you brought up your delivery wagon, where did you go first?

A. To the warehouse.

Q. What did you do there?

A. I got a load of what they call shorts and took them to the wharf.

Q. Under anybody's direction?

A. Yes, Mr. Frederickson's and he told me to come back and get a load for the Carlisle Packing Company.

Q. Which way did you go when you left the warehouse?

A. I went down B Avenue to First Street.

Q. And from there north to the store building?

A. Yes, sir.

Q. Then you came back to the warehouse to get the rest of the orders. A. Yes, sir.

Q. I ask you this question: did anyone ever di-

(Testimony of F. J. Sullivan.)

rect you as to the method of loading the wagon in taking goods from the warehouse?

A. If I had a big load Frederickson would always tell me how to get the most on—help me to put it on.

Q. When you reached the warehouse on this second trip what was done or said between Frederickson and yourself?

A. I backed up to the door and put on the rest of the orders. He had them ready for me. It filled the wagon completely. [29—12]

Q. Did anyone tell you where you were to take this load?

A. Yes, Mr. Frederickson gave me the tickets and told me to take it to Carlisle Packing Company.

Q. What amount of goods did you put on the wagon?

Q. I had between fifteen and sixteen hundred pounds; not less than that.

Q. These tickets that you speak of,—they were the bills?     A. Yes, sir.

Q. To whom did you deliver those?

A. I had them signed as always. I had them signed in the Carlisle Packing Company and brought them back.

Q. Who did you give them to?

A. I gave them to Frederickson. Sometimes I took them to the office and sometimes I gave them to Frederickson.

Q. When you had the load on, the load as you testified; what did you do?

A. I pulled out and—

(Testimony of F. J. Sullivan.)

Mr. FOSTER.—Just a minute, show the jury on the diagram what you did.

A. Well, I went out through the warehouse and I just made a turn into the hill.

Q. Did you turn in the middle of the street?

A. Yes, sir.

Q. Go ahead—

A. Then he told me to stop a minute, that he had some more stuff to go.

Q. He told you to stop?      A. Yes, sir.

Q. What did you say, if anything?

A. I said I had all I could put on. He said he realized there was no more room but he would put it on on the footboard, so he put the four cases of milk and three cases of butter on the footboard.  
[29A—13]

Q. What did he say?

A. He said I would have to get down the hill with it. He said—

Mr. DONOHOE.—We object to this testimony.

The COURT.—Objection overruled. Exception allowed.

Mr. FOSTER.—Go ahead and state what Frederickson said?

A. Frederickson told me he had four cases of milk and three cases of butter to go to the store. I told him there was no room in the wagon for it and he said there wasn't and we would put it on the footboard. The first thing I knew there was four cases of milk and three cases of butter there.

Mr. DONOHOE.—We object to that. The wit-



(Testimony of F. J. Sullivan.)

ness was not asked that. He should just answer the question.

The COURT.—Yes, Mr. Sullivan, you should just answer the questions.

Q. After Frederickson had put these cases of butter on the footboard, where were you at that time?

A. I was in the seat, standing on the footboard.

Q. And what did he do with the milk, if anything?

A. The four cases of milk he put on the seat.

Q. How were they arranged?

A. Two on each side of me.

Q. And you in the middle?      A. Yes, sir.

Q. Was there any further conversation between you and Frederickson in regard to these things at that time?

A. Why, there was no further conversation. I objected to taking them and he said I would have to take them. He said I would have to take them or quit, somebody else would.

Q. You can state what happened then. Where did Frederickson go when he put the last case on the seat?      A. He went into the warehouse.

[30—14]

Q. Did you see Dudley Allen at that time?

A. I know who he is.

Q. Who is he?

A. A salesman for some firm in Seattle.

Q. Did you see him then?

A. He just came up the hill at that time.

(Testimony of F. J. Sullivan.)

Q. In what position was the horse at the time these additional cases were put on the wagon?

A. Facing down the hill.

Q. Did you have the brake on?      A. Yes, sir.

Q. What is the weight of a case of milk?

A. I am not sure but I think it is seventy-two pounds.

Q. What is the weight of a case of butter?

A. Sixty pounds of butter in a case.

Q. You say there were seven cases altogether?

A. That is what I think there was—as near as I can remember.

Q. What happened then?

A. While I was looking up there the horse started to go and I grabbed the line with one hand and put the other hand on the two cases of milk there and my feet on the case of butter. The horse started to go and the case of milk slid off and hit the horse and then the wagon dropped into a kind of a hole, a rut in the snow, and me and the case of milk fell on the side in the bank and I slid under the wagon and the first wheel ran over my leg and I was dragged then between the wheels and the other wheel ran over my leg again and broke it.

Q. By reference to the diagram, how far were you when the case of milk fell off?

A. I was just about here (indicating). [31—15]

Q. How far would you say that was below the alley?

A. I would say about thirty feet or more.

(Testimony of F. J. Sullivan.)

Q. When was it that the first wheel ran over you?

A. Just as soon as I slid under the wagon. I hit a piece of ice. The ice and snow was lined up alongside the trail there and as soon as I fell the hub of the wheel turned me over, and the horse ran away, and I was in between, dragging.

Q. How far were you dragged?

A. Down to in front of Laurie's store.

Q. Then what happened to you?

A. I was taken to the hospital then, that was all.

Q. What happened to you at the hospital?

A. Well, they cut the clothes off my leg and body and put me to bed.

Q. Did the doctor attend you?

A. Not right away, he did five days afterwards.

Q. What did he do to you?

A. He bored a hole in my heel and put a sack of rocks, used a spike and rigged up a block and pulley and set it.

Q. In what condition was your leg as to being broken or otherwise?

A. It had been broken in three places. This one bone was broken twice and that bone broke like that (indicating).

Q. How long were you in the hospital?

A. Two months.

Q. What wages had you been receiving from Blum-O'Neill? A. \$150 a month.

Q. Have you done any work since the accident, the 4th of May last? A. No, sir. [32—16]

(Testimony of F. J. Sullivan.)

Q. Are you now able to work at manual labor?

A. No, sir.

Q. Do you know any other business but mining or manual labor; I mean to say are you a bookkeeper or an office man?      A. No, sir.

Q. Who paid your hospital and doctor bills?

A. I paid it.

Q. Has that leg been painful?

A. Not now, it isn't painful.

Q. Has it been painful?      A. Yes, sir.

Q. How long a time?

A. After four months, it didn't pain very much after that.

Q. Well, how about the four months?

A. It was painful up until then, yes.

Q. Describe the kind of pain?

A. Well, I don't know how I can describe it. You might know what any leg would be like, broken and fractured. It is just a general pain, I guess.

Q. Did you have an X-ray picture taken of this leg recently?      A. Yes, sir.

Q. By whom?      A. By Dr. Beeson.

Q. Where?      A. Anchorage.

Q. Who took the picture?

A. Dr. Thompson and Dr. Beeson, both together.

Q. When did this take place?

A. It is about a month ago.

Q. Was it the 12th of January?

A. Yes, I think it was about the twelfth or thirteenth. [33—17]

Q. And what time of day was this picture taken?



(Testimony of F. J. Sullivan.)

A. It was taken about, I am not sure, I think it was about two o'clock.

Q. And after the picture was taken what did Dr. Thompson do?

A. He developed it right in the room. There is a little dark room there. They developed it there.

Q. While you were present? A. Yes, sir.

Q. Handing you Plaintiff's Exhibit "A" for identification, contained in an envelop, I will ask you to look at this plate and state whether or not that is the plate which you have testified to as having been taken and developed by Dr. Thompson in your presence on the twelfth of January.

A. Yes, sir, it is.

Q. What does that show.

Mr. DONOHOE.—It shows for itself.

Mr. FOSTER.—Well, we offer it in evidence and ask it be marked Plaintiff's Exhibit "A."

Mr. DONOHOE.—We object to its introduction in evidence on the ground that it is not proved to be a picture taken by an operator of an X-ray machine, and has not been properly identified.

The COURT.—I understand he says he saw it taken and developed.

Mr. FOSTER.—Has this been in your possession ever since?

A. It has been in Dr. Beeson's possession. He sent it by registered mail over here.

Mr. DONOHOE.—We renew the objection on the ground that he has not had possession of the picture all the time.

(Testimony of F. J. Sullivan.)

Mr. FOSTER.—Is that the original picture taken in Dr. Beeson's office. [34—18]

A. Yes sir, it is. Every break in the leg is shown in that picture. It is easy to see it. A blind man could see it.

The COURT.—Objection overruled. Exception allowed.

The X-ray is admitted in evidence and will be marked Plaintiff's Exhibit "A."

Q. Has the Blum-O'Neill Company paid you anything as damages or compensation in this matter?

A. I got the month's pay; the month I was working when I broke my leg.

Q. The month of May? A. Yes.

Q. Have they paid you anything other than that?

A. No, sir.

Q. You have claimed damages in the sum of \$5,000 for pain and suffering? A. Yes, sir.

Q. Do you consider that would compensate you?

Mr. DONOHUE.—We object to that question—it's improper.

The COURT.—The objection is sustained. Exception allowed.

Q. What kind of a business do the Blum-O'Neill carry on?

A. General merchandise—hardware—furnishings.

Q. A retail business?

A. Wholesale and retail.

Q. What can you say as to the size of the concern?

A. I don't know exactly, but they have been known to do a business of \$400,000 or more a year.

(Testimony of F. J. Sullivan.)

Q. Where do they do business?

A. It did business in McCarthy and Chitina and Valdez, I guess. It doesn't now, though—they have sold out.

Q. But where do they do business as a wholesale and retail firm? A. Cordova, Alaska. [35—19]

Q. Any other place where their stuff is sold?

A. All over the territory; in the Copper River valley and to the canneries.

Q. Is it a large concern?

Mr. DONOHOE.—The witness has already testified to that.

Mr. FOSTER.—All right, then.

Q. Are you a married man? A. Yes, sir.

Mr. FOSTER.—That is all.

Cross-examination by Mr. DONOHOE.

Q. Any children? A. No, sir.

Q. Where is the Carlisle business situated to which you were taking these groceries on the morning of the 4th of May? A. On the ocean dock.

Q. How did you reach Carlisle's from the warehouse and store of Blum-O'Neill on the first trip?

A. Well, down B Street to First Street and right on First Street to the dock.

Q. Or you might have gone up B Street to Second and down Second Street to C and then to First?

A. You can go that way.

Q. How much farther is it by going up B Street to Second, up Second to C and down C than it is to go down to First on B and go that way. What's the distance—how much farther?

(Testimony of F. J. Sullivan.)

A. I don't know exactly what the distance would be. It would not be a great deal.

Q. Now you have had considerable experience as deliveryman for retail stores in Alaska, haven't you? A. A little, yes. [36—20]

Q. And you have had quite a lot in Cordova?

A. Yes, sir.

Q. And with that experience in Cordova, you were familiar with the condition of the streets on the fourth of May, 1922? A. I was.

Q. When did you commence working for the Blum-O'Neill Company the last time?

A. I am not sure but I think it was about the first of October—I am not sure about that.

Q. Had you recently returned from Anchorage?

A. Yes.

Q. Who hired you? A. Mr. O'Neill.

Q. H. I. O'Neill? A. Yes.

Q. And where did you draw your pay. Who paid you?

A. Well, I got paid in the store. Everybody got paid there.

Q. With a Blum-O'Neill check? A. Yes, sir.

Q. Now you say you commenced sometime in October, 1921? A. Yes.

Q. You were laid off for a short time after that, weren't you? Between that and the fourth of May?

A. I was off two days.

Q. You were fired, weren't you? Mr. O'Neill discharged you?



(Testimony of F. J. Sullivan.)

A. Not that I know of. I went off a Saturday afternoon and I came back on a Tuesday and he told me to come on Thursday.

Q. Didn't Mr. O'Neill discharge you?

A. Not to my knowledge.

Q. Didn't he discharge you for being drunk?

A. No, sir. [37—21]

Q. Didn't you come back in a few days and tell him that if he would put you back to work you would come?

A. He told me he had put somebody on the wagon that day and there wasn't much doing and for me to come back on Wednesday.

Q. He put you to work again? A. Yes, sir.

Q. If you were not discharged why did you come to him on Tuesday to get the job back?

A. It is quite natural I would come down to go back to work.

Q. Is that your explanation of it?

A. Yes, I came back to work on a Monday; at least I was coming down and I met Harry O'Neill the Sunday afternoon before and I said I was coming back and he said, "I thought you weren't coming to work to-morrow and Jack is going on." So Mr. O'Neill said he put Jack on and it wasn't busy anyway and for me not to come for a day or two.

Q. What time of the day was it that you came down to see Mr. O'Neill?

Mr. FOSTER.—What month did this take place in?

(Testimony of F. J. Sullivan.)

The WITNESS.—It was in February, 1922.

A. I don't know exactly about what time it was—I think it was about ten o'clock.

Q. You usually go to work at eight o'clock don't you?     A. Yes, sir.

Q. In your work where do you report in the mornings at eight o'clock with your horses and wagons?     A. At the warehouse.

Q. Do you report first at the warehouse?

A. Always.

Q. You are willing to swear positively that you report first at the warehouse?

A. Yes, sir. [38—22]

Q. When did you report at the store?

A. As soon as I got my load on of shorts.

Q. You take a load of shorts from the warehouse down to the store?     A. Yes, sir.

Q. What is meant by "shorts."

A. Odds and ends for the counters and shelves, groceries.

Q. The practice there, was it not, that they kept a supply of groceries in the store to fill the small orders with, and the orders such as full sacks or cases you got at the warehouse?     A. Yes, sir.

Q. And these shorts were sent down every morning from the warehouse to the store so they would be able to fill small orders?     A. They were.

Q. You delivered the groceries locally, all around.

A. Yes.

Q. So we will have this thing straight, I will ask you what would be the disposition of an order if I

(Testimony of F. J. Sullivan.)

should have stepped into that store on the fourth of May, down on the corner of C and First Streets and gave an order for a half dozen of milk; half a dozen corn; couple pounds of bacon; can of coffee, and a sack of flour and a sack of sugar?

Mr. RAY.—We object to that. The witness has not testified as to the conduct of the store.

The COURT.—As I understand it, he delivered from the store also. It is admissible. Exception allowed.

Q. How would it be filled?

A. It would be filled in the store as a general rule, yes.

Q. Is it not a fact that in such an order as that they would fill the small things from the store, and you would go for the sack of sugar and sack of flour to the warehouse?

A. Yes, whichever way was most convenient.  
[39—23]

Q. They didn't carry a big supply at the store?

A. No, sir.

Q. Was it usual when full sacks or cases were ordered, that you got them at the warehouse and the small things at the store?

A. No, it was usual to get everything at the warehouse except something which people took away.

Q. That was previous to 1921? A. Yes.

Q. Didn't they make a change in 1921?

A. Yes, sir.

Q. After October, 1921, and up to May, 1922, was it the custom when there would be an order turned

(Testimony of F. J. Sullivan.)

in at the store such as I spoke of for shorts and full cases and sacks to get the small things at the store? A. It was.

Q. And you would go to the warehouse for the full sacks and cases? A. Yes, sir.

Q. You delivered from the store as well as the warehouse?

A. Yes, whenever there was anything to deliver from there.

Q. There was more to deliver from the store than from the warehouse, wasn't there? A. No, sir.

Q. How often did you report at the store?

A. I couldn't tell that. I reported whenever they had business for me. If they wanted me they would call up and if Mr. Frederickson wanted me to go, told me to go and get the load out and I would take it.

Q. They had a delivery counter in the store?

A. Yes, sir.

Q. Now, is it not a fact that every morning at ten o'clock you would pick up all the things on that counter, which they would put there for you to take, and deliver to the residences? [40—24]

A. Yes, that's a fact, I would pick those up and then go to the warehouse and pick up the other orders.

Q. You say that was done after the month of October, 1921?

A. That was done up until the day I left.

Q. I thought you said that all the small things



(Testimony of F. J. Sullivan.)

were put up in the store and the other large things in the warehouse?

A. Yes, but the people that call in to Frederickson at the warehouse he put up there.

Q. How many people called in at Frederickson's?

A. I couldn't answer that.

Q. What was the proportion of what called in at Frederickson's and those calling in at the store?

A. It seems to me that there was just as many calls there as they had at the store.

Q. Do you mean to swear to that?

A. I am answering your question, Mr. Donohoe; I was not there all the time. I am just telling you what it seemed to me.

Q. I am just asking you if you mean to tell this jury and Court that there were as many calls in the warehouse as in the store?

A. I think there were more at times and sometimes less—that is what I think.

Q. And there was one man in the warehouse at that time?

A. Well, whenever it was busy there were always three or more.

Q. How many men were working in the warehouse up until the fourth of May?

A. Just me and Mr. Frederickson.

Q. How many men were working in the store, in the grocery department?      A. Two men.

Q. Who were they?

A. There was Bob Gunnisen and Mr. Clark, part of the time.

(Testimony of F. J. Sullivan.)

Q. Did you spend a good deal of your time in the warehouse?

A. Why, part of the time. [41—25]

Q. You were delivering some of the time?

A. Certainly.

Q. During this time of your last employment there and up until the fourth of May, 1922, you took orders from the boys in the store as to deliveries, didn't you?

A. As to delivering goods, no, sir, I didn't. No, sir, whenever I had anything to do Mr. O'Neill said I could go to the store and get whatever there was. He told me to go to Frederickson first.

Q. Mr. O'Neill told you to take orders from the boys in the store, didn't he. Didn't he tell you to take the orders out as they told you?

A. No, sir; he told me to take orders from Mr. Frederickson and anything he had to do, to do it first; and he told me to go down there and do that first.

Q. Now, tell me when that conversation took place? That conversation between you and Mr. O'Neill?

A. When Mr. O'Neill hired me first he told me to go to Mr. Frederickson and he would give me orders.

Q. He told you to go to Mr. Frederickson and take orders? A. Yes, sir.

Q. Mr. O'Neill told you to go to Mr. Frederickson and take orders? A. Yes he did.

(Testimony of F. J. Sullivan.)

Q. Is it not a fact that you had some difficulty with Bud Anderson as to delivering some packages up to the jail and the matter was taken up with Mr. O'Neill and he said you would have to take up the packages or he would have to get somebody else? A. I don't remember that.

Q. You don't remember having trouble with Bud Anderson?

A. I don't remember these things. Anybody might have trouble anytime. [42—26]

Q. Did you have trouble with Bud Anderson about delivering goods from the store?

A. I never had any great trouble with anybody.

Q. Did you have any trouble with him?

A. Not that I know of.

Q. Don't you remember of it having been taken up with Mr. O'Neill?

Mr. FOSTER.—We object to this. He's already said he didn't remember it.

The COURT.—It is admissible only as testing the credibility of the witness. Objection overruled. Exception allowed.

A. No, sir.

Q. Did you haul from the warehouse the goods that went up the railroad when they were sold and shipped on the railroad? A. Sometimes.

Q. Most of the time they were hauled by the Alaska Transfer Co., were they not?

A. Yes, sir.

Q. Just occasionally you hauled them?

A. Yes, sir.

(Testimony of F. J. Sullivan.)

Q. Do you know how Frederickson received those orders for putting up those goods?

A. Most of the time he received them from the store. Whenever they called in there he would get them.

Q. And you would sometimes bring up a memorandum from the store to the warehouse for him to fill?     A. Yes, sir.

Q. This Carlisle outfit—goods went to them—do you know how Frederickson got that order?

A. He got that order direct to the warehouse, as a rule.

Q. Do you know how he got that order on the third of May?

A. He got that to the warehouse. He got that from the storekeeper the night before; he got it on the telephone. [43—27]

Q. Do you mean that the storekeeper at the Carlisle Company telephoned it to Frederickson?

A. Yes, he usually did.

Q. Are you willing to swear that that order was telephoned direct from the Carlisle Company and didn't come through the store?

A. That is what the storekeeper told me; that he called up Frederickson so as to prevent delay.

Q. You don't know of your own knowledge that he telephoned Frederickson?

A. That is my knowledge. I am almost positive of it. Most of the time the orders came from there that way.



(Testimony of F. J. Sullivan.)

Q. Will you say that this order didn't come from the Blum-O'Neill store on First Street?

A. I didn't bring it up there. He told me he had it the night before.

Q. Frederickson? A. Yes, sir.

Q. And when you got there he had the load ready for you? A. He did.

Q. And you hauled the load down first and came back for another load? A. Yes, sir.

Q. The first load was principally shorts, small orders, wasn't it?

A. I don't know exactly what it was composed of. Most of it was composed of cases of milk.

Q. What time of the day was it you took the first load down? A. About nine o'clock.

Q. And the second?

A. I don't know exactly, about eleven o'clock; maybe a little afterwards. [44—28]

Q. You and Frederickson were pretty good friends? A. Yes, sir.

Q. Always have been very friendly?

A. Yes, sir.

Q. Frederickson always had a friendly interest in you? A. Yes.

Q. After you were injured he called at the hospital? A. Yes.

Q. Called quite frequently? A. Yes, sir.

Q. And he would sit there and converse with you?

A. He did.

Q. After you got out of the hospital you used to

(Testimony of F. J. Sullivan.)

drop in the warehouse and chat with him occasionally?     A. Yes, sir.

Q. And you were always quite friendly?

A. Yes.

Q. Now, Mr. Sullivan, you claim that this load, or that this accident and the injuries you received was due to Frederickson's carelessness, don't you?

A. I didn't put it that way.

Q. That is, you figure that because Frederickson piled this stuff on extra, that is what caused your accident?     A. I think so.

Q. It is directly through Frederickson's carelessness that you were injured?     A. Yes, sir.

Q. Now when did you first tell Frederickson that it was through his carelessness you were injured?

A. I don't remember ever having told him that.

Q. During all these meetings you never accused him of being [44A—29] responsible for it?

A. Never, only I told him that it was by the way the load was piled on.

Q. You say you remonstrated and argued with him when he told you there was some more goods to go on the wagon and he said you would have to take them or quit and yet, after the accident, when he called on you, you never told him he was to blame for it.

A. He and I, we had a talk about it. I don't remember he called on me after I left the hospital.

Q. You have already testified he called on you for a while?     A. Certainly.

(Testimony of F. J. Sullivan.)

Q. And you used to stop up at the warehouse frequently after you got out of the hospital.

A. Yes.

Q. And still you are now willing to swear your leg was broken through his carelessness?

A. I said it was broken because of the way he put too much load on. That is my claim; that is my claim that I hold.

Q. I read from your complaint, paragraph five: "That on said 4th day of May, 1922, at the order of said Fred Frederickson, plaintiff backed said delivery wagon up to the door of said warehouse for the purpose of taking a load of groceries to the main store of plaintiff. That when said wagon was full and no more could be safely placed thereon, plaintiff started to drive away. That when plaintiff had proceeded about twenty feet from the said warehouse door, said Frederickson called for him to stop and against the remonstrances of plaintiff, piled seven cases of milk and eggs on and in front of the seat of said wagon. That by reason of the placing of said additional cases of produce on said wagon, plaintiff had no safe place to sit nor had he any safe place from which [45—30] to control the said horse of defendant. That plaintiff so informed the said Frederickson, agent of defendant as above stated, but said Frederickson said that the goods would have to go. Before plaintiff could get down from the wagon or remove himself to a safe place, said horse started down said hill and the boxes piled in the front of said wagon by said

(Testimony of F. J. Sullivan.)

Frederickson slid forward and over the dashboard, striking the horse and causing him to become frightened” and so on— Now, it is your contention that Frederickson’s carelessness and recklessness in putting your load there caused your injury?

A. Yes.

Q. And still you were friendly with him right afterwards when he called at the hospital?

A. Yes.

Q. I will ask you if the second day after you were in the hospital, in the town of Cordova, Territory of Alaska, you and Fred Frederickson being present and no other person being present, the following conversation, in words to this effect, took place: “Frederickson said, ‘Sully, how did the accident happen? Was the horse to blame?’ and you replied: ‘The horse was not to blame. It was the street that was to blame.’ ”

A. Not that I know of. That’s news to me.

Q. Now, I believe you stated in your direct examination that Frederickson took in about forty or fifty dollars a day at the warehouse. How do you know that?

A. That is what I figured it. There is no settled account in any store, of course.

Q. He might have only taken in \$5.00 as far as you know? A. It isn’t likely.

Q. Are you sure he took in \$30 or \$40 a day?

A. I think he did. Sometimes it was more than that, sometimes less. [46—31]

Q. What makes you think it?



(Testimony of F. J. Sullivan.)

A. Because I seen the girl take away more and less than that. The bookkeeper came up and took the charge slips away and any money that was taken in.

Q. Do you know who hired Frederickson?

A. I wasn't there then.

Q. Did you see Mr. O'Neill there quite often?

A. He would come up there on busy days to work with Bud Anderson.

Q. That was previous to the change in the system when they used to put up the shorts in the warehouse and before they put up the shorts at the store? In other words, did you see Bud Anderson or Mr. O'Neill put up any goods after the first of the year 1922? A. Yes, sir.

Q. When?

A. Well I don't know just when. On train days Mr. O'Neill, Harry and Bud Anderson, all three would come up to help out.

Q. Come up to help out? A. Yes, sir.

Q. Did you see Mr. O'Neill there any other time?

A. Sometimes, yes.

Q. Is it not a fact that he used to visit there every day? A. No, sir.

Q. How many days a week?

A. Sometimes, maybe, once a week.

Q. How do you know whether he would be there. You were away a good portion of the day?

A. He could have been there while I was some other place.

(Testimony of F. J. Sullivan.)

Q. Yet you are willing to say he was not up there?     A. I never said that.

Q. How many trucks did they have in the warehouse for piling on goods?

A. Four delivery trucks, I think so. [47—32]

Q. That is these trucks that have two wheels in the center and a wheel on each end?     A. Yes, sir.

Q. What other duties did you say Frederickson had besides putting up groceries?

A. Well, I guess he would have the duties of any salesman, to take orders.

Q. You are bearing down pretty heavy on the salesman. Did you consider him a salesman or a warehouseman?

A. I think he was a good salesman. One of the best. That was his reputation around there.

Q. Did you consider his position that of salesman or warehouseman?

A. I think just like a man in charge of any place. He was considered the foreman of the warehouse.

Q. Did he attend fires to keep the temperature right, to protect the goods from freezing, and keep the place in shape that way.

A. I didn't take any diagram of what he was doing.

Q. Did he attend the fires and keep the temperature of the warehouse proper?

A. I think he did.

Q. And he checked up on the goods to find out if you were running low on any lines?

A. Yes, sir.

(Testimony of F. J. Sullivan.)

Q. And if orders were sent up from the store he would fill the orders? A. He would.

Q. And you would deliver them if they were local orders? A. Yes.

Q. And that is the way you would get your orders—from the store? A. Yes. [48—33]

Q. Any orders turned in at the store that were to be filled up at the warehouse, you would either bring a memorandum with you or they would telephone to Frederickson? A. Yes, sir.

Q. And you called and got those orders and distributed them around the town? A. Yes, sir.

Q. Do you know where this milk was piled in the warehouse? A. Yes, sir.

Q. Whereabouts was it?

A. Well, it was straight back from the door.

Q. Just across the warehouse? A. Yes.

Q. About fifty feet from the door?

A. I don't know how many feet.

Q. It was about fifty feet wide? A. Yes, sir.

Q. I notice you say in your complaint you piled on some eggs but in your testimony you say it was butter; which was it?

A. It might have been both. I know there was a case of butter under my feet.

Q. You wouldn't recognize the difference between butter and eggs?

A. I would, but as far as I know it was milk and butter. That is what I thought it was.

Q. I wanted to know which it was. In your

(Testimony of F. J. Sullivan.)

complaint it is eggs and in your testimony you say butter. Just explain that?

A. I couldn't swear to it. I know I had four cases of milk and one case of butter.

Q. Is there any great difference in a case of butter and a case of eggs?

A. There is. [49—34]

Q. What is the size of a case of butter, length and width?

A. I don't know the length and width of it.

Q. Do you know the length of a case of eggs?

A. No, I don't.

Q. Do you know the length and width of a case of milk? A. No, sir.

Q. Where was the butter piled in the warehouse?

A. Right inside the door a little ways.

Q. As I understand it, you went to the warehouse on the 4th of May, 1922, went up to the warehouse and got a load of goods that you took to the Carlisle Packing Co. about nine o'clock in the morning, and then you came back? A. Yes, sir.

Q. What route did you take coming back to the warehouse?

A. I went around First Street and up B.

Q. You are quite positive you didn't come by way of C Street to Second and along Second to B, and down B? A. I am.

Q. There was considerable snow on the lower part of B Street, wasn't there? A. Yes.

Q. And there was a cut shoveled out partly there?



(Testimony of F. J. Sullivan.)

A. I don't know—I don't remember that. There was a passage there the city had cut out.

Q. How deep would you say the snow was on that track or trail? A. I can't tell you that.

Q. There was quite a little snow there?

A. Yes, sir.

Q. Now, when you came back Frederickson had the load ready for you on the truck?

A. Yes, he did.

Q. Do you know what the load consisted of?

A. There was a general load. [50—35]

Q. You have testified there was sixteen or seventeen hundred pounds. What did it consist of?

A. Sure, I don't know exactly what it was, Mr. Donohoe. It was a general load of groceries. I didn't take count of it.

Q. I will ask you if there was six cases of eggs?

A. I can't tell you what was in there.

Q. You can tell about the additional things that were put on but you can't tell anything at all about what made up the sixteen or seventeen hundred pounds load you testified there was on the wagon before that, is that right?

A. Well, that was before the accident and I didn't pay any attention to what it was.

Q. I'm asking you if there was six cases of eggs in that load? A. I don't know how many.

Q. How many cases of toast were there?

A. I don't know.

Q. And still you are willing to swear it weighed sixteen or seventeen hundred pounds.

(Testimony of F. J. Sullivan.)

A. I can tell from the load on my wagon. I considered the load was between fifteen and seventeen hundred pounds. I never weighed these things; I just take it from what is in a load. I can pretty nearly tell. I know my wagon will hold from fifteen to seventeen hundred pounds and if I had any room left I would have no occasion to put it in the seat.

Q. You are willing to swear that there was sixteen or seventeen hundred pounds in the load and you can't name any of the articles?

A. Well, I'm not a prophet, Mr. Donohoe. I would have quite a memory if I could remember what was in every load I took out.

Q. I will ask you if that load didn't consist of six cases of milk; six cases of eggs; four cases of toast; one sack of split peas and one sack of Jap rice. A. I couldn't tell you. [51—36]

Q. And do you know what a case of eggs weighs?

A. Yes, about sixty pounds.

Q. Do you know what toast weighs?

A. Toast—it doesn't weigh much.

Q. About thirty-four pounds?

A. I imagine that would be about it.

Q. And a sack of Jap rice weighs about how much? A. Either fifty or a hundred pounds.

Q. And this was a hundred pound sack?

A. Yes, sir.

Q. And do you know what a sack of split peas weighs?

A. Split peas—they come in fifties and hundreds.

(Testimony of F. J. Sullivan.)

Q. And you are willing to swear to this jury that there was sixteen or seventeen hundred pounds on that wagon? A. To the best of my knowledge.

Q. And you are basing your knowledge when you don't know the contents of the load?

A. No, I know the wagon was full.

Q. And you can't say what was on it?

A. I can't.

Q. From just looking at the load you say there was sixteen or seventeen hundred pounds?

A. Yes.

Q. That is the best you can say on that question.

A. Yes, sir, it is.

Q. Now, you say that Frederickson piled four cases of milk on the seat after you already started away? A. Yes, sir.

Q. How did he pile them?

A. He put them on the footboard. He kept piling them up on it and he threw them to me.

Q. He shoved them to you and you piled them up? A. Yes, sir. [52—37]

Q. How long did it take to put those on?

A. I don't know.

Q. Well, how long would it take?

A. Oh, I guess about five minutes; not that long, three minutes.

Q. And he shoved them onto the footboard and you put it on the seat? A. Yes.

Q. He shoved seven cases that way?

A. I don't remember seven cases. I know I had

(Testimony of F. J. Sullivan.)

four cases of milk on the seat and three cases of butter. Well, that's what I think it is, yes.

Q. How long is that seat?

A. I don't know the length of that seat. I don't know just how long it would be. Room for probably three people to sit.

Q. Would you say it was more than thirty-six inches long?

A. Probably thirty-six or forty inches.

Q. Do you know the dimensions of a case of milk?

A. I guess a case of milk; I imagine it would be twenty-four inches to two and a half feet long.

Q. How wide?

A. About—I don't know exactly, but I imagine about eighteen inches wide.

Q. And how high? A. About the same height.

Q. Now, there was four cases put on and you were sitting in the middle of them in the seat?

A. Yes, sir.

Q. Two, one on top of the other, on each side of you? A. That is my recollection of it. [53—38]

Q. That is your recollection of it?

A. Yes. If I knew that I was going to have an accident I would have taken notice of it. I didn't know there was going to be an accident. That's the way I remember it.

Q. You have a pretty good memory for most things, Sully? A. I have a pretty good memory.

Q. You are not feeble-minded or anything like that? A. No.

Q. Now, on a seat not to exceed forty inches long



(Testimony of F. J. Sullivan.)

you had two cases of milk on each side of you and those cases were, as you say, two and a half feet long and eighteen inches wide, which would give you about four inches to sit on if you were between those two cases and you say you were. Is that true? Do you want this jury to believe that?

A. It is not likely I was sitting on four inches.

Q. Is it not a fact that after you got that load on there that you said to Frederickson that they wanted a case of milk down at the store and you went in and got it and drove down to the store?

A. No, I never got to the store, and I didn't get any case of milk. Frederickson brought out the stuff.

Q. How did Frederickson bring this to the wagon?

A. He brought it in a truck and just threw it on the footboard.

Q. And you put it on the seat? A. Yes, sir.

Q. And still you plead that you didn't have time to get down off the wagon? A. I didn't.

Q. But you had time to get the milk and put it up alongside of you?

A. I put it outside of the way in the seat. [54—39]

Q. Now, Mr. Sullivan, you say Mr. Frederickson brought out this milk. State where he got this milk to put on the wagon that you testified to?

A. He got it in the warehouse.

Q. Did he get it after you drove away?

A. After I drove away.

(Testimony of F. J. Sullivan.)

Q. That is, after you drove from the warehouse door?

A. He must have. He told me to wait a while, that he had some more stuff to go.

Q. How long did you wait there?

A. A very short time.

Q. Who did you first tell that this accident was caused by Frederickson putting on this additional load?

Mr. RAY.—We object to that as improper cross-examination.

The COURT.—Objection overruled. Exception allowed.

A. The first one I told that to was Mr. Meyer Blum. He was up to the hospital to see me. He agreed I had too much load on.

Q. When was this?

A. Three or four days after the accident.

Q. You told Mr. Meyer Blum that your injury was caused by Frederickson overloading the wagon?

A. It was in the conversation.

Q. You told Mr. Meyer Blum that you received your injury because Frederickson had put too much stuff on the wagon?

A. Yes, that is just what it consisted of, that's it; and I had the same talk with him afterwards.

Q. And still you would go around and visit Frederickson at the warehouse?

A. I don't claim he had any intention that I was going to have that accident; still I had to do what he told me. [55—40]

(Testimony of F. J. Sullivan.)

Q. But you don't hold anything against Frederickson? A. I don't.

Q. Because he hasn't money to respond?

A. I don't quite see what you are getting at, Mr. Donohoe.

Q. Don't you feel that the accident occurred through Frederickson's carelessness?

A. Yes, and that's the reason why the Blum O'Neill Company ought to be responsible for it.

Q. Do you feel that the accident occurred through Frederickson's carelessness? A. I do, yes.

Q. And you never felt sore at him on that account? A. I can't say I never felt sore at him.

Q. You never felt he was to blame for your injury; told him that his overloading you was the cause of the accident.

A. I told Frederickson what I thought the cause was; how the place was. Of course, a part of it was caused by the snow and condition of the street, but I told him that the stuff that crowded me off the seat—the weight was responsible.

Q. Do you remember having a conversation with Frederickson in which you stated that you were going to try and hold the Blum-O'Neill Company for the accident, on the streets of Cordova one evening when he was walking home in the end of August, 1922? Do you remember having a conversation with Frederickson on this subject at that time?

A. Yes, sir.

Q. I will ask you if at that conversation which took place on the streets of Cordova, about the latter

(Testimony of F. J. Sullivan.)

part of August, 1922, yourself and Mr. Frederickson being present and none others, that you made this statement in language to this effect: "You said to Frederickson that you felt that the city should [56—41] pay you for the accident on account of the poor streets and you also thought that the Blum-O'Neill Company were responsible to you for the accident and should pay you something."

A. No, sir; I didn't say any such thing. There was a conversation and I told Mr. Frederickson that I thought the Blum-O'Neill Company was responsible for my accident owing to the way it happened and Frederickson insisted he thought the city was. That was the only conversation we had on that day.

Q. That was the first conversation; the first time you had spoken of holding Blum-O'Neill?

A. We talked about the accident many times.

Q. You fully realize you can't make the Blum-O'Neill Co. pay you unless it is on account of the carelessness of Frederickson, don't you?

A. I don't know anything about law; I am not a lawyer.

Q. You are coming into court without knowing anything about how to proceed to establish your case, is that it?     A. No, sir.

Q. Now, what is the space between the front of this wagon—the seat on this wagon and the dashboard?     A. The space?

Q. Yes.     A. I don't know exactly.

Recess until 1:30 P. M.



(Testimony of F. J. Sullivan.)

The WITNESS.—There was a statement I made this morning about the case of milk that I measured; I was entirely wrong. I gave the wrong measurements on it. [57—42]

Mr. FOSTER.—He just wants to correct a statement he made at that time.

The COURT.—Very well, he may do so.

The WITNESS.—It is regarding the case of milk. It is nineteen and a half by twelve and a half by nine and a half feet high.

Q. I want to go over the question of the loading of the wagon with you. You have had considerable experience in delivering goods from the stores, haven't you? A. Yes, sir.

Q. You know how to load a delivery wagon?

A. I pretend to.

Q. You state that Mr. Frederickson had instructed you how to load the wagon. Did you need any instructions?

A. I said he did whenever we had a big order. He also told me the best way as to how to put on the most. He arranged it and so he told me how to load it.

Q. He told you how to load the wagon?

A. Yes, sir.

Q. Was not your experience sufficient to tell you how to load the wagon to the best advantage?

A. Well, I could load a wagon. Of course, I could. I didn't say I couldn't.

Q. How did Frederickson bring the extra cases out to the wagon. Those extra cases of milk and

(Testimony of F. J. Sullivan.)

butter you spoke about. Did he carry them out in his hands? A. Certainly.

Q. Where did he get them from?

A. The truck at the door.

Q. How many did he carry at a time?

A. One. [58—43]

Q. I believe you say you protested against him putting on the extra stuff? A. Yes, sir; I did.

Q. What did you say?

A. I told him the wagon was loaded and there was no more could get on—if he found room to put them on.

Q. What did he say?

A. He said he would put them on the footboard.

Q. Did he say anything else?

A. No, sir; he just carried them out and put them on the footboard.

Q. He placed them on the footboard and you put them on the seat?

A. Yes, he put two on the seat and I put the rest.

Q. How could he reach up on the seat. How much higher was it than to the footboard?

A. Oh, anybody could throw a box on the seat. I put the ones further up myself.

Q. You don't mean to say that Frederickson said if you didn't take the load down you could quit?

A. Yes, he did.

Q. Are you sure he said that?

A. That is what I understood him to say.

Q. And he insisted that you should take this down? A. Yes, sir.

(Testimony of F. J. Sullivan.)

Q. And he said if you didn't you could quit?

A. Something similar to that.

Q. That is what you understood him to say?

A. Yes.

Q. And did you tell him that it was too big a load to go down that street where the snow was on?

A. Why, I was satisfied I could take the load down if I hadn't the load on the footboard and the seat.

Q. How long was he getting those cases from the back on to the truck? [59—44]

A. It might be a couple of minutes.

Q. He travelled twenty feet out and twenty feet back in seven times, that's forty feet seven times or two hundred and eighty feet. He made seven trips, didn't he? And you say he did that all in a couple of minutes.

A. I don't know; I didn't measure the trips.

Q. You say the wagon was twenty feet away from the door when you stopped?

A. Yes, I thought it was.

Q. Where were you when he first started to put the first case of milk on the wagon?

A. On the seat.

Q. On which side of the seat?

A. I was on the right side of the seat.

Q. On the right side? A. Yes.

Q. And the left-hand side, was it put on the left-hand side?

A. He just threw them on the footboard.

Q. And you put them on the seat?

(Testimony of F. J. Sullivan.)

A. Yes, sir.

Q. Was that done with all of them. Where did he put the three cases of butter?

A. On the footboard.

Q. And were they piled on the footboard one on top of the other?

A. There was one under my feet and the other two were on the left-hand side.

Q. How wide is the footboard?

A. I didn't measure it.

Q. There is no dashboard on this wagon?

A. Dashboard?

Q. Yes. A. No, sir. [60—45]

Q. Would you say the footboard was more than nine inches wide?

A. I couldn't tell you; I didn't measure it.

Q. Now, Mr. Sullivan, you testified something about the horse and wagon; who instructed you to take the horse and wagon this morning, if anybody.

A. I was instructed the night before. Mr. Fredrickson told me.

Q. Where was he when he told you that?

A. In the warehouse.

Q. You were using a double-ender at that time?

A. Yes, sir.

Q. Is it not a fact that Mr. O'Neill spoke to you the morning of the third about hitching the horse to the wagon? A. Yes, sir.

Q. That everybody else was on wheels in the town?



(Testimony of F. J. Sullivan.)

A. I was told about that several times.

Q. Just answer my question; didn't Mr. O'Neill tell you on the third day of May that everybody was on wheels and that you ought not to be dragging that sled over the ground?

A. He told me on the second day of May that.

Q. Didn't you tell him on the 3d day of May that Jerry O'Leary was fixing the wagon and would have it ready in a day?

A. Jerry O'Leary wasn't fixing the wagon.

Q. You told him that?     A. Yes.

Q. And you told him it would be ready to-morrow?     A. I didn't tell him that.

Q. And when Mr. O'Neill asked you on the third day why you didn't take the wagon that everybody was on wheels you told him that Jerry O'Leary was fixing it.

A. No, sir; I told him the snow was too deep.

Q. Wasn't everybody else on wheels at that time?

A. Everybody with big wheels. The big wagons with big wheels. [61—46]

Q. Wasn't First Street practically bare of snow?

A. Yes, sir.

Q. Was the road down to the ocean dock clear?

A. There was deep snow on the hill.

Q. How deep?     A. I don't know.

Q. You didn't have any difficulty in getting the wagon down with the first load, did you?

A. I just barely made it, that was all.

Q. Now do you mean to say that you never went

(Testimony of F. J. Sullivan.)

to Mr. O'Neill for orders; instructions about anything connected with the business?

A. I never went to Mr. O'Neill on the general delivery system, never.

Q. Never asked Mr. O'Neill for instructions on anything?

A. Many's the time I asked him for instructions on things.

Q. Now, what are they? What did you consult him about?

A. I don't know. I can't mention anything in general now. I never went to him regarding deliveries though. I couldn't go there every time—he had men to look after that.

Q. But you knew he was the general head of the whole concern? A. Yes, sir.

Q. He was general superintendent of the whole proposition? A. Yes, sir.

Q. Over at the warehouse and store and stables, he was general superintendent, manager—wasn't he?

A. Yes, sir; that is what I took him to be.

Q. How many men were working under Fredrickson during the entire month of April, 1922, and up to the fourth day of May, 1922, in the warehouse?

A. Three days a week there was always two or three. Other days there was only me and him. [62—47]

Q. Do you mean to swear that there were two or three men up there working in April, 1922?

(Testimony of F. J. Sullivan.)

A. Of course, I mean to say that.

Q. Who were the men who were there?

A. They weren't connected with the warehouse; Bud Anderson, Harry O'Neill and sometimes an extra man, which Frederickson would get himself.

Q. They would come up from the store?

A. Yes, on the busy days.

Q. Mr. O'Neill would come up?      A. Yes.

Q. And Mr. Anderson?      A. Yes.

Q. And young Harry O'Neill—Mr. O'Neill's son?

A. Yes.

Q. They would come up and help you and Frederickson to put up goods going out on the train?

A. Certainly.

Q. Now, you said something about Frederickson hiring and firing some men. Did I understand you correctly in that?

A. I didn't say that. I said if we were busy and needed somebody and he knew some men he would hire them.

Q. How did you know he hired them?

A. No more than I seen it myself.

Q. Did you hear a conversation?      A. Yes, sir.

Q. Who did he hire? You can't name a single person he hired, can you?

A. There were several people that lived up there in cabins that he knew. I didn't know them only to see them.

Q. Can you name a single person that Frederickson hired?

(Testimony of F. J. Sullivan.)

A. I don't remember their names, no sir. [63—48]

Mr. FOSTER.—What did you mean by “several people that lived up there in cabins” being hired by Frederickson?

A. It was always people not working around there. Fellows living in cabins; any body that came around there; Frederickson would hire them and settle up with them.

Mr. FOSTER.—I wish you would describe this delivery wagon again?

Mr. DONOHOE.—I submit this has all been gone over.

The COURT.—Yes, unless there is some testimony the witness wishes to make clear.

The WITNESS.—The only thing in the delivery wagon I have been mistaken in is that the tires were an inch and a half and not two inches wide. Outside of that it is a standard delivery wagon.

That is all.

Witness excused. [64—49]

### **Testimony of Betty Satterlee, for Plaintiff.**

BETTY SATTERLEE, called and sworn as a witness in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FOSTER.

Q. What is your name?      A. Betty Satterlee.

Q. Where do you reside?      A. Cordova.

Q. How long have you lived in Cordova?

A. About six years.



(Testimony of Betty Satterlee.)

Q. Are you acquainted with Florence Sullivan, the plaintiff in this case?     A. I am.

Q. Are you acquainted with the firm of Blum-O'Neill?     A. I am.

Q. Do you know where their place of business is?

A. Yes, sir.

Q. Do you know where the building known as the Blum building is?     A. I do.

Q. Calling your attention to the fourth of May, 1922, what were you doing at that time, on that day?

A. I was working for the tailor shop, Lien's tailor shop on First Avenue.

Q. I will ask you, Mrs. Satterlee, to look at this map or plan; this being the Blum building; this is the Blum-O'Neill store and this is First Avenue. Now where is Lien's tailor shop on that map?

A. Right on the corner of First Avenue and B.

Q. I will ask you what kind of a door the shop has. How is the door built there? [65—50]

A. It is cut right across the corner like that. It faces the street looking this way (indicating).

Q. Single or double door?

A. It is a double door.

Q. Glass door?     A. Yes, sir.

Q. On the fourth of May, 1922, what was the weather in the morning, warm or cold?

A. The sun was shining and it had been thawing, I think.

Q. What were you doing at that time?

(Testimony of Betty Satterlee.)

A. I was sitting there waiting for work and looking out.

Q. At what time was this?

A. Between eleven and twelve o'clock.

Q. As you sat there between eleven and twelve o'clock, what did you do, if anything?

A. Well, I noticed the wagon.

Q. What wagon?

A. The Blum-O'Neil delivery wagon. Sully was on it. It was at the top of the hill just ready to come down the hill and I noticed the wagon being loaded pretty heavy or loaded high, but it was a very large load I thought to myself; and Sully was sitting there, and the horse had just started as I looked up. Sully had his hands on some high boxes; he had the lines in one hand, I think, and he was holding the boxes with the other.

Q. Just tell what happened?

A. The horse started and he hadn't gone but a little ways until there was a box fell off the part of the wagon which struck the horse and frightened the horse and he plunged, and with that it jerked Sully out with a couple more boxes and he fell between the horse and the wagon, the [66—51] front wheel running over him, and then as I saw that I screamed for help and I rushed out to the cross street at the foot of the hill and with that Sully was being dragged and got between the wheels, and the way the snow was in the street in the bank on one side he was caught in between them and rolled down to the foot of the hill; then

(Testimony of Betty Satterlee.)

the hind wheel ran over him and the horse went down the street. I picked Sully up and held him.

Q. Do you trade with the Blum-O'Neill Company?     A. I do.

Q. How long have you been doing so?

A. Ever since I have been in Cordova.

Q. What has been your occupation?

A. I ran a little bakery there for quite a while, up until a year and a half ago when I sold out.

Q. But since October 1, 1921, with whom did you trade? To whom did you give your orders?

A. I usually went to the warehouse and in fact when I bought anything from the Blum-O'Neill Co. at that time I always went to the warehouse after it.

Q. Who did you trade with at the warehouse?

A. Fred Frederickson.

Q. Was it your custom in trading at the warehouse to ring up the main office or the warehouse?

A. I would ring up the warehouse, but I usually went in person to the warehouse.

Q. What kind of a stock did they have at the warehouse, do you know?

A. Everything in the grocery line.

Q. Do you know whether they had furniture in the same building?

Mr. DONOHOE.—We object to any further questions on this line as not tending to prove any of the issues in the [67—52] pleadings. There is no issue that Frederickson was the head of a sepa-

(Testimony of Betty Satterlee.)

rate department and that is what this testimony is attempting to prove.

The COURT.—I think it should stop with the testimony about the groceries. There is no furniture in the case. The objection is overruled. Exception allowed.

A. Yes, sir; there was.

Q. Did you ever purchase any of that or deal in the furniture department?

Mr. DONOHOE.—We make the same objection on the same grounds.

The COURT.—The objection is overruled. Exception allowed.

A. Very little, I never bought very much furniture other than some linoleum.

Q. With whom did you deal?

A. Fred Frederickson.

Q. Was there any other person there in charge of those things besides Frederickson?

A. At one time there was a Mr. Philips there.

Q. But from October 1, 1921?

A. I think Fred was the only one there since then.

Cross-examination by Mr. DONOHOE.

Q. On which end of the seat of this wagon was Mr. Sullivan sitting at the time you first saw him at the warehouse?

A. I don't know just exactly, but I know he had his right hand over these boxes.

Q. His right hand?



(Testimony of Betty Satterlee.)

A. Yes, sir; and he was holding the horse with his left hand as he came down the street.

Q. Did you say he fell somewhere along about the upper end of the Laurie building, right beside that?

A. Well, I would judge it was about the middle of the distance— [68—53]

Q. Between the warehouse and First Street?

A. Yes, I don't know just exactly.

Q. When you were doing this trading, you were running a restaurant at that time?

A. A bakery.

Q. Whereabouts was your bakery?

A. It was in the Lewis building on First Avenue by Wilsons.

Q. Most of these orders you turned in to the warehouse were for full boxes or cases, weren't they? A. No, sir; not always.

Q. Didn't you sometimes order a sack of flour or a sack of sugar?

A. Yes, sir; but we usually bought on a very small scale.

Q. How came you to get in the practice of going to the warehouse and not the store?

A. It was nearer. The real reason was because we liked Fred Frederickson and we rather deal with him.

Q. You would rather deal with him than Bud Anderson, is that it? A. Yes, sir.

Q. Frederickson was quite a friend of yours?

(Testimony of J. L. Bulkley.)

A. Yes, I liked Fred.

Mr. DONOHOE.—That is all.

The witness excused. [69—54]

**Testimony of J. L. Bulkley, for Plaintiff.**

J. L. BULKLEY, called and sworn as a witness in behalf of the plaintiff, testified as follows:

Direct Examination by Mr. FOSTER.

Q. What is your name? A. J. L. Bulkley.

Q. Are you a regularly licensed physician and surgeon in the Territory of Alaska? A. I am.

Q. Graduate of a medical school?

A. Yes, sir.

Q. What school?

A. Syracuse University, New York.

Mr. DIMOND.—We will admit he is fully qualified as a doctor.

Q. Have you in the past week made an examination of the plaintiff in this action, Sullivan?

A. Yes, sir; but not in the past week.

Q. In the past two weeks?

A. I think it was previous to that. It was before that.

Q. How long ago? A. That I cannot state.

Q. Since the first of the month?

A. I think so, I could not state that positively.

Q. You made a thorough examination of his leg? A. I did.

Q. Handing you Plaintiff's Exhibit "A," I will ask you to examine that exhibit. From the exami-

(Testimony of J. L. Bulkley.)

nation you have made of plaintiff's leg what have you to say as to that film?

Mr. DIMOND.—Object to the question as the witness has not shown himself competent to testify as to the film; and we raise the same objection to this testimony as to the film [70—55] because Dr. Beeson is not here to testify as to its taking and the testimony is mere hearsay. The witness Sullivan is not competent to identify it.

The COURT.—The latter part of the objection as to the identification of the plate is overruled.

Mr. FOSTER.—They have already admitted he was qualified.

Mr. DIMOND.—I will admit Dr. Bulkley can take X-ray pictures and is generally qualified as a physician.

The COURT.—Very well, you may qualify him.

Mr. FOSTER.—Have you ever taken X-ray pictures?     A. I have.

Q. Have you in your practice seen many X-ray pictures?

A. I have seen some X-ray pictures; I do not know whether you would call them many.

Q. Are you familiar with the anatomy of the human form?     A. Yes, sir, supposed to be.

Q. From your experience as a physician and surgeon, and from your examination and study of the X-ray, can you take a picture such as you have and from that state the general characteristics of the leg from which it was taken—the condition of the bones?     A. I think I can, yes, sir.

(Testimony of J. L. Bulkley.)

Q. You may state what that picture shows to you.

Mr. DIMOND.—Same objection.

The COURT.—Overruled. Exception allowed.

Mr. FOSTER.—Taking into consideration your physical examination of the plaintiff.

A. I believe this X-ray negative to be a picture of the leg that I examined.

Mr. DIMOND.—We move that the answer be stricken. We will admit his general qualifications, but he has not shown his qualifications to testify as to this particular picture. [71—56]

The COURT.—I am not certain about his knowledge; but it has been testified by Mr. Sullivan it is the plate taken by Dr. Beeson of his leg.

Mr. FOSTER.—It has been admitted in evidence as the picture of Sullivan's leg which was taken.

The COURT.—Mr. Sullivan testified that he was present when this was taken; that the plate was developed by Dr. Beeson and he mailed it over here himself. Dr. Bulkley here testified he has examined Mr. Sullivan's leg. I don't think he should testify as to what he found from examining Mr. Sullivan's leg in connection with what the plate shows. I think they are separate.

Q. What did you find from that plate. What does that show as to the condition of the leg?

Mr. DIMOND.—We object to the question. If he made the plate he could have testified from it.

The COURT.—The objection is overruled. Exception allowed.

A. Fracture of both bones.



(Testimony of J. L. Bulkley.)

Q. Recent or somewhat long standing?

Mr. DIMOND.—Same objection.

The COURT.—The objection is overruled. Exception allowed.

A. I am unable to say. I don't think anybody could say that.

Q. What can you say as to the knitting or condition as shown by that plate of those bones?

Mr. DIMOND.—I wish the record to show that our objection goes to all the testimony of Dr. Bulkley about this plate.

The COURT.—Yes, it is understood all this goes in under objection.

Q. I will ask you this first: From your examination of Sullivan, what do you find as to the present condition of his injured leg, his maimed leg? [72—57]

A. The leg itself is crooked. The bone is set. While it is set in fair alignment it is not set in perfect alignment. The upper fragment is anterior to the lower fragment. It is forward, shoved down and sort of projects.

The COURT.—Is there anything in the pleadings about improper setting?

The WITNESS.—Why, that is not my attempt; I don't say it was an improper setting. In fact, I think it was set very well.

Mr. DIMOND.—We move to strike all this testimony on the ground that there is no foundation for it in the pleadings. The pleadings show he suffered a compound fracture of the leg and was compelled

(Testimony of J. L. Bulkley.)

to pay doctor and hospital bills in the amount of \$418; that he has suffered loss of wages in the sum of \$150 a month; that he will be crippled for a year from the date of his injury and has suffered pain and anguish. There is nothing about any malformation of the leg.

Mr. RAY.—It is alleged in the prayer for damages that the crippled condition will probably continue for a year, and the doctor is asked to describe the condition which he finds at this time. It is merely preliminary to further questions as to the time of recovery from the accident of the crippled condition, and the time before the leg will be entirely well. It leads up to the testimony which goes to cover that particular element of damage.

The COURT.—The motion is denied. The jury will be specially instructed about that. Exception allowed.

Q. From an examination you have made of the plaintiff in this action would you say he is at this time able to do manual labor?

A. In my opinion he is not. [73—58]

Q. In your opinion how long, approximately, will it be before he can do the work of a laboring man, the ordinary common laborer. I am not asking you exactly.

A. I think from the condition of his leg that I would not expect him to do heavy manual labor for six months.

The COURT.—From this time?

A. Yes.

(Testimony of J. L. Bulkley.)

Cross-examination by Mr. DIMOND.

Q. I think you said in your direct examination that from your inspection of the plaintiff's leg you found a fracture of both bones?

A. That is correct; yes, sir.

Q. Present existing fracture?

A. No, previous fracture.

Q. And the bones have united?

A. To a certain extent. It is hard to say exactly how much.

Q. Do you find a callous?      A. On both bones.

Q. Upon what do you base your opinion that plaintiff will not be able to perform labor for about six months?

A. The apparent weakness of the leg. I made up my mind from manipulations of the leg and the way he walked when he is bearing his weight on that leg.

Q. Do you mean the weakness of the bones?

A. Well, the effect of the weight on the bones.

Q. Do you find any motion that would proceed from the fracture?      A. No, no motion.

Q. The bones are as strong as they were before the fracture, are they not?

A. I could not make any impression other than that of weakness on handling. [74—59]

Q. A weakness of the bones?

A. The only way that could be shown would be by the X-ray. That's the only way you could tell that. In handling it caused him pain—

Q. That would be subjective or objective symp-

(Testimony of J. L. Bulkley.)

toms. Which would that be, Doctor, subjective or objective symptoms?

A. They would be subjective symptoms.

Q. In other words, he told you it caused him pain when you attempted to manipulate the bones?

A. Yes, sir.

Q. And so far as you know, are able to determine from your own manipulations, aside from the statement of the plaintiff made to you, they are just as strong as before the fracture?

A. I would say so, yes.

Q. You are not basing your opinion upon any muscular weakness in the leg? A. No, sir.

Q. Did you make any examination of Mr. Sullivan before the fracture? A. No, sir.

Q. And you don't know when the injury occurred? A. No, sir.

Q. And are you prepared to say, Doctor, that the results that you observed from this leg were not caused by failure to take care of it after it was broken and not by the original fracture?

A. I have no means of knowing.

Q. Is that leg shorter than the other?

A. I did not measure it. I think it must be on account of the position of the bones.

Q. Do the bones overlap?

A. There seems to be a slight overlapping. I should judge it was an oblique break. It is exceedingly difficult to get a perfect union where there is an oblique break. [75—60]

Q. How far would you say the bones have pro-



(Testimony of J. L. Bulkley.)

ceeded further away? A. About a half an inch.

Q. I think you said the leg was crooked. Is it in fact twisted in or out, or is it in imperfect alignment? A. In imperfect alignment.

Witness excused.

Plaintiff rests.

Mr. DONOHOE.—In making a strenuous effort to get through this case to-day, I want to make a motion at this time. I do not care to argue it. The reason for making it at this time is to preserve the record.

Mr. DONOHOE.—Comes now the above-named defendant and moves this court for an order granting a nonsuit against the plaintiff and dismissing the case on the following grounds:

1. The complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant in this, that the plaintiff in his complaint has failed to plead facts sufficient, if true, to make Fred Frederickson a vice-principal of said defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

2. That plaintiff has wholly failed by his evidence to prove that the said Fred Frederickson acted as vice-principal in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

3. That it is clearly shown by plaintiff's testimony that if said Fred Frederickson was guilty of

any negligence, it was the negligence of a fellow-servant and not of a vice-principal. [76—61]

4. That upon the evidence introduced by plaintiff, it clearly establishes the fact that plaintiff, by his conduct at and immediately before the time of the accident, assumed the risk which resulted in the accident which caused the injuries complained of.

5. That it is clearly established by the evidence of the plaintiff that the accident which caused the injury complained of was brought about through the sole negligence of plaintiff and, therefore, he is guilty of contributory negligence which bars his recovery against the defendant in this action.

The COURT.—Motion denied. Exception allowed. [77—62]

## DEFENSE.

### Testimony of H. I. O'Neill, for Defendant.

H. I. O'NEILL, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. DONOHUE.

Q. State your name, age and residence?

A. H. I. O'Neill, 39 years, Cordova, Alaska.

Q. How long have you resided in Cordova?

A. Since 1908.

Q. What business are you engaged in?

A. Mercantile business.

Q. How long have you been engaged in the mercantile business? A. Since 1912.

Q. Are you acquainted with the plaintiff in this case? A. Yes, sir.

(Testimony of H. I. O'Neill.)

Q. Acquainted with the defendant in this action, one of the stockholders? A. Yes, sir.

Q. How long has Blum-O'Neill Company been doing business? A. Since 1915.

Q. And you have been connected with them all that time? A. Yes, sir.

Q. What position, if any, do you occupy with the defendant company, Blum-O'Neill Company?

A. Vice-president and manager.

Q. Are you the general manager of its business?

A. Yes, sir.

Q. Does it conduct business at any other place than Cordova? A. No, sir. [78—63]

Q. Did Blum-O'Neill Company ever conduct a store in Chitina or McCarthy?

A. Never did outside Cordova, no, sir.

Q. What are your duties as general manager of the company?

A. Well, handling most of the things pertaining to the business.

Q. General supervision? A. Yes, sir.

Q. And how long have you held that position?

A. Since we incorporated in 1915.

Q. Are you acquainted with Fred Frederickson?

A. Yes, sir.

Q. What position does Frederickson occupy in that company?

A. He is warehouse man, we call him.

Q. Where do you conduct your mercantile business?

A. On First Street in the corner of C in Cordova.

(Testimony of H. I. O'Neill.)

Q. Will you point it out on the chart there?

A. Yes, sir.

Q. Is it marked anything?

A. Blum-O'Neill Company's store.

Q. Where is your warehouse, if you have any?

A. Up here on Second Avenue and B.

Q. Where was the entrance to this warehouse?

A. Right here on the alley, half way between First and Second Streets on B Avenue.

Q. Is that in the basement of the building?

A. Yes, sir.

Q. Is it the basement of the building you formerly occupied, that place?      A. Yes, sir.

Q. How long had you occupied that building previous to the fourth day of May?

A. Since we incorporated in 1915. [79—64]

Q. Now what were the duties of Fred Frederickson as warehouseman from October, 1921, up to May 4, 1922?

A. He checked the freight in as hauled by the transfer company and checked the orders as they were shipped out on the line; took care of the building, fires and furnace; looked after it in a general way; saw that the temperature was right for the goods and put up the orders given him to fill.

Q. Where would he get these orders?

A. For up the line they were written in our office and given to him.

Q. In the office down at the store?      A. Yes, sir.

Q. How else would he get orders for any other things?



(Testimony of H. I. O'Neill.)

A. People would come in like the lady testified here, would come in and order something, some little thing; or the boys would send an order from the store for shorts to put up.

Q. What would these sales average a day, approximately, that Frederickson would make?

A. When we changed there in 1921 some days it would not run three or four or five dollars; possibly some restaurant order he would take in—that would naturally bring the sales up a little more.

Q. What would they average?

A. I don't suppose they would average more than, I couldn't say, probably ten or fifteen dollars a day.

Q. What became of the sale slips and money realized?

A. As far as the money was concerned, there was very little money taken in. Our instructions were not to make a retail establishment out of that place, but rather than to send a person out of the place he would sell a dozen eggs or a couple of pounds of bacon. [80—65]

Q. And he supplied some of the restaurants direct from the warehouse? A. Yes, sir.

Q. And what would become of the charge slips he would take in?

A. He had a book for that purpose, taken care of the same as the rest, and gathered up each night by a young lady.

Q. Were they gathered up the same as the slips down at the store were gathered up?

A. Every night, yes, sir.

(Testimony of H. I. O'Neill.)

Q. Did you frequent the warehouse very often in your capacity as general manager?

A. Every day. Sometimes two or three times a day.

Q. What did you do there?

A. What brought me always up there the first thing in the morning as a rule I would drop in there on my way to work. Then I would go through the sales slips and if I found any errors I would drop up there again to call his attention to any errors he might have made, or to tell him to discontinue the credit of some individual, something like that, which brought me up there about 10:20 every day.

Q. From the store to your residence you passed by the warehouse?     A. Yes, sir.

Q. Now, under whose command and control and general direction was Fred Frederickson?

A. Under mine.

Q. Did he have authority to open any credit accounts?     A. No, sir.

Mr. RAY.—Just one question: What was the authority of Frederickson?

The WITNESS.—Frederickson had no personal authority of his own.

Q. What would he do when any question would arise, come up.

A. He either called me on the phone, or let the matter drop until I went up there. [81—66]

Q. From October, 1921, to and including May 4, 1922, did Frederickson have any other authority,

(Testimony of H. I. O'Neill.)

such as control over employees or hiring employees? A. Absolutely not.

Q. Did Frederickson at any time during the period last mentioned ever employ or discharge any employee? A. He did not.

Q. Who did employ the men engaged in your mercantile business? A. I did.

Q. During the period from October, 1921, up to and including the 4th day of May, 1922, what was your average force of men?

A. From eight to ten.

Q. That included the bookkeeper?

A. That included the two young ladies in the office.

Q. How many men were employed in the warehouse during that period? A. One.

Q. Who was that? A. Fred Frederickson.

Q. You are acquainted with Mr. Sullivan?

A. Yes, sir.

Q. How long have you known Mr. Sullivan?

A. I must have known him since about 1912.

Q. Had he worked for you from time to time?

A. Yes, he worked for us a couple of different times.

Q. Do you remember him going to work for you in the fall of 1921, October or about then?

A. Yes, I hired him about that time, along about then.

Q. Was there a short interval of interruption in his work between October, 1921, and the fourth day of May, 1922? A. There was. [82—67]

(Testimony of H. I. O'Neill.)

Q. What was the cause of that?

A. For drunkenness—I laid him off.

Q. Who laid him off?     A. I did.

Q. When did you put him on again?

A. Four days afterwards.

Q. Who rehired him?     A. I did.

Q. What were Sullivan's duties from October, 1921, up to and including the fourth of May, 1922?

A. The delivery of groceries and the other articles that might be given him, such as furniture and clothing.

Q. Where was it Sullivan's duty to report the first thing in the morning?

A. After we had changed the putting up of orders up above he reported at the main store.

Q. When was that change made?

A. I think it was made about February or March, 1921.

Q. That was previous to Sullivan's re-employment?     A. Yes, sir.

Q. The change had been made previous to that?

A. Yes, sir.

Q. Please explain this change from up above. What did you mean by this change from up above?

Mr. RAY.—Now, this is all before Sullivan even went to work on the employment on which he was injured.

Mr. DONOHOE.—I'll withdraw the question.

Q. Just state when and where it was Sullivan's duty to report in the morning after you employed



(Testimony of H. I. O'Neill.)

him in October, 1921. Where did he first report in the morning?

A. He reported at the store on First Street.  
[83—68]

Q. What were his duties after reporting there? What was he supposed to do there?

A. He was given, as a rule, a short list of items to get from the warehouse, made out by Mr. Anderson and a couple of ladies working there; to go up to the warehouse and get them and bring them down to the main store, to get the stuff in stock for the day.

Q. Just explain how you carry these stocks in the warehouse and what is meant by "shorts."

A. The store is of such nature that we didn't have room for bulky articles in the store so it was kept in the warehouse and each morning the boys made out a "short" list and Sully went up to the warehouse and got a couple of cases of milk, or a box of something, to fill up the shelves so we would have plenty of goods to take care of the small retail orders of the day.

Q. If an order would come into the store during the day for say very small articles and then a sack of sugar and a sack of flour and a case of milk, how would that be handled?

A. If an order called for ten pounds of sugar and a sack of spuds and some other bulky things not carried in large quantities at the store, the repacks, as we call them, would be put up in the main store and the heavy items would be phoned up to Fred

(Testimony of H. I. O'Neill.)

Frederickson by the man who put up the order, and ask him to put so and so's name on the items and set them at the door, or there would be a list attached to the rest of the merchandise so that he could go to the warehouse and pick up the rest of the stuff short on the order as we never carried any such large stuff in the main store. [84—69]

Q. All your bulky orders such as sacks and cases were filled from the warehouse? A. Yes, sir.

Q. Do you know of the Carlisle Packing Company order filled on May 4, 1922? A. I do.

Q. How did that order come in?

Mr. RAY.—We object to the question. If they have any records let us see them. Where is the record of it?

The WITNESS.—We have a record of it. I mailed it over to you, Mr. Donohoe.

Q. What did you mean by a record?

A. I mean the original order taken by the clerk in the store for this particular order that the accident happened with.

Q. What were Sullivan's duties in relation to delivering orders from either the store or warehouse?

A. He would come into the store and go back to his delivery counter and pick up such items as already put up for him there, and if there was an order to go to the city dock Mr. Anderson would—

Mr. RAY.—Now, your Honor, we object to all this. Let us get down to the accident. We submit it is an awful waste of time. It is irrelevant.

The COURT.—I fail to see its relevancy but he

(Testimony of H. I. O'Neill.)

may answer. Objection overruled. Exception allowed.

Mr. DONOHOE.—Proceed.

A. Tell him to take it.

Q. And was Sullivan subject to anybody's orders in regard to delivering goods from either the warehouse or store? A. Yes, sir.

Q. Whose orders was he?

A. He was subject to Mr. Anderson's orders at the store. [85—70]

Q. And whose orders at the warehouse?

A. Mr. Frederickson's, if any.

Q. Did Mr. Sullivan have any difficulty with Bud Anderson in the store about deliveries at one time during this recent employment? A. He did.

Q. Just state the circumstances of that and what you instructed him?

Mr. RAY.—I don't know the relevancy of this. I object on the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Mr. O'Neill has testified that when he took orders from the main store they were from Mr. Anderson. I think the objection will have to be sustained. Exception allowed.

Q. Did you have a conversation with Sullivan on the third day of May, 1922, in regard to the method of delivering things from the store by wagon or sled? A. I did.

Q. Just state what occurred?

A. I came in the store about half past eight in the morning of the third and noticed Sullivan had the

(Testimony of H. I. O'Neill.)

double-enders still out. The words I said were "Sully, when the devil are you going to hook up the wagon instead of pulling the guts out of this horse." He told me he had the wagon down to Pat O'Toole's and he would be fixed up in a day or two and I said, "That's the trouble with you, you always leave it to the last moment."

Q. In compliance with that request, did Sullivan produce the horse and wagon?

A. He had the horse and wagon on the job the next morning.

Q. When did you first see him on the fourth day of May?

A. I saw him passing the door with some stuff on the wagon for the Carlisle Packing Company.  
[86—71]

Q. Just step down here and see this order?

A. It is the order that is supposed to have the butter and eggs on.

Q. I hand you a paper marked Defendant's Exhibit "I," and ask you what those two pages are; what is it?

A. It is an order for groceries from the Carlisle Packing Company to be delivered to their cannery.

Q. What date is it?      A. May 4, 1922.

Q. Whose handwriting is that?

A. Bud Anderson's.

Q. Where did Bud Anderson work at that time?

A. In the store on First Street.

Q. Do you know how that order was sent up to the warehouse?



(Testimony of H. I. O'Neill.)

A. It had to be sent up by a messenger. That is the only way it could get up there.

Mr. DONOHOE.—We offer it in evidence as Defendant's Exh. "I."

Mr. RAY.—No objection.

The COURT.—It will be admitted as Defendant's Exhibit "I."

Q. What were the conditions of the streets of Cordova as to snow on the fourth day of May, 1922?

A. First Street was practically bare of snow and there was very little snow on Second Street, and there was absolutely no snow on the street between the warehouse and Second Street. This street from the warehouse door (indicating on map) which is the upper end of this place was absolutely bare of snow and down along this street is very little snow. There was considerable snow down here for the reason it was shovelled off from the buildings. There is always a lot of snow shovelled into this street every year, but down here there is practically no snow. This street was absolutely bare [87—72] and there was very little snow. There was some snow up in here.

Q. What is the relative grade between C Street and B Street?

A. The relative grade: It is a very slight grade here on C Street, almost level.

Q. What is the grade on B Street from the warehouse down to First Street?

A. It is about thirteen per cent.

(Testimony of H. I. O'Neill.)

Q. And what is it from the warehouse up to Second Street?   A. About ten per cent.

Q. Do these items appearing on Defendant's Exhibit "I" represent the order of goods delivered by the Blum-O'Neill Company to the Carlisle Packing Company on May fourth and in delivering which the plaintiff was engaged at the time of the accident?   A. They do.

Q. Were there any of those items delivered directly from the wharf to the Carlisle Packing Company, or where were they delivered from?

A. With the exception of the twenty cases of milk, it was from the warehouse.

Q. Were there some eggs?

A. There were some cases of eggs, I believe ten cases of eggs.

Q. And how many were delivered from the warehouse that morning?   A. The whole ten cases.

Q. What became of the milk? Where did those twenty cases of milk come from?

A. It was delivered by Mr. Sullivan from the dock to the Carlisle Packing Company.

Q. You got a consignment on a ship and just transferred it. It never came up town at all?

A. That's it. You have Mr. Sullivan's signature there where he signed for it. [88—73]

Q. It never came up town at all?   A. No, sir.

Q. Who in your organization had the control and supervision of your delivery outfit; horses, wagons and automobiles?   A. I did.

(Testimony of H. I. O'Neill.)

Q. Did any of the employees have any supervision or control over that branch of your business?

A. No, sir.

Q. And who is the person that actually looked after it?

A. The delivery man looked after the horses, wagons—kept them in shape.

Q. Did Fred Frederickson have any authority whatever over your horses and wagons and things you used for delivery of goods? A. No, sir.

Q. Did he ever have any authority to direct Sullivan in relation to the horses and wagons?

A. He never did it.

Q. He never had such authority? A. No, sir.

Q. You heard Mr. Sullivan testifying that Frederickson ordered him to change from the sled to the wagon on the third day of May?

A. I heard him say that.

Q. Did Frederickson have any authority to make such order?

A. He certainly did not and Sully knows it.

Q. Just state what authority, if any, Frederickson had over Sullivan, the plaintiff in this action?

A. I would not call it authority at all. He would come in for an order and Fred would say, "Here's an order for Mrs. Satterlee or something for the model"; that is all. [89—74]

Q. Where were you at the time of the accident?

A. In the main store.

Q. How soon did you learn of the accident?

(Testimony of H. I. O'Neill.)

A. I got to the hospital just about the time Sully got there. I went right up to the hospital.

Q. Mr. O'Neill, are you acquainted with Dudley G. Allen? A. Yes, sir.

Q. When this case was set for trial did you make an effort to locate him and have him here as a witness? A. I did.

Q. And where did you ascertain where he was?

Mr. RAY.—We object to that; there is a stipulation here. We object to that.

Mr. DONOHUE.—I want to explain how we came to enter into a rather odd stipulation by telegraph.

The COURT.—I don't think it is necessary.

A. I located him in Portland.

Q. And do you know of afterwards wiring him several questions to be answered, on stipulation with attorneys for the plaintiff? A. I did.

Mr. RAY.—We object to that.

Mr. DONOHUE.—I want to prove that they were telegraphed.

The COURT.—I suppose your stipulation covers most of the questions and answers.

Mr. DONOHUE (to Mr. FOSTER).—Do you admit that the Blum-O'Neill Company is a corporation duly organized in the Territory of Alaska; has paid its license tax and so forth?

Mr. FOSTER.—Yes, we admit all that.

The COURT.—Let the record show that the plaintiff admits that the defendant is a duly organized corporation and has paid its license fee.



(Testimony of H. I. O'Neill.)

Cross-examination by Mr. RAY.

Q. In making up your returns with reference to a payment of licenses to the clerk of this court for engaging in a general mercantile business, do you include the business transacted in your warehouse?

A. Yes, it is all one business.

Q. And you sell goods there at retail?

A. No, sir; not using it at all now.

Q. Now, you mean this present day?

A. Yes, sir.

Q. How about May 4, 1922?

A. If some customer like Mrs. Satterlee happened to drop in there for something she got it.

Q. You say you have no license for the warehouse as distinguished from your other business?

A. No, sir.

Q. You say Sullivan would report at the store every morning? A. Yes, sir.

Q. You had how many employees?

A. Eight or ten.

Q. And two bookkeepers to take care of the volume of business transacted?

A. One bookkeeper and filing clerk.

Q. And you did a general wholesale and retail business?

A. We are no wholesale store, just retail. We are not recognized as wholesalers.

Q. This Mr. Dudley Allen, is he a broker known as a travelling salesman? A. Yes, sir.

Q. And makes Alaska a part of his territory?

(Testimony of H. I. O'Neill.)

A. Yes, sir.

Q. And gets orders from you and Brown and Hawkins?

A. He don't get any orders from us. [91—76]

Q. Does he represent the National Grocery Company? A. No, sir.

Q. Did you ever buy a dollar's worth of goods from Dudley Allen? A. No, sir.

Q. Ever buy any True Blue Biscuits from him?

A. No, sir. There was some eggs we got and couldn't use.

Q. Just those eggs? A. Yes, sir.

Q. And will you say whether he depends entirely upon the amount of sales he makes for his compensation. Does he work on a commission basis?

A. I understand he does.

Q. You didn't witness this accident?

A. No, sir.

Q. You disclaim liability for any injury this man has suffered on the ground that a man working with him caused the injury, or that he assumed the risk of his employment. That is possibly a question of law and fact, not fair. You paid Sullivan \$150 a month? A. Yes, sir.

Q. And have paid him nothing since the accident?

A. I paid him for the last month he didn't work.

Q. That would be the month of May?

A. Yes, sir.

Q. Sullivan had been connected with the outfit,

(Testimony of H. I. O'Neill.)

Blum-O'Neill and S. Blum & Co., off and on for six years had he not?

Mr. DONOHOE.—We object to that question.

Mr. RAY.—Well, had Sullivan been working for the Blum family—

Mr. DONOHOE.—We object to the question put in that way.

The COURT.—Objection sustained. Exception allowed. [92—77]

Q. Is Mr. Meyer Blum connected with the company at Cordova? A. He is.

Q. And was he on May 4, 1922? A. Yes, sir.

Q. You say no person other than yourself gave any orders or directions to Sully?

A. Outside of in the manner that I stated a while ago.

Q. Not to confuse you with grocery orders: there were no directions given with any authority of yours to Sullivan by any other employee?

A. Yes, sir, that's right.

Q. And if Frederickson said to Sully, "Take this load down to the Carlisle Packing Company," he did so without any authority from you?

A. Yes, sir.

That is all.

(By Mr. DONOHOE.)

Q. Did you understand the last question of Mr. Ray's? A. I think so.

The question repeated.

The WITNESS.—Frederickson had the right to

(Testimony of H. I. O'Neill.)

tell him to take it down to the Carlisle Packing Company.

Q. If either at the store or warehouse there was a bill of goods to be delivered to somebody, Anderson at the store or Frederickson at the warehouse had the right to tell him to deliver those things?

A. Yes, sir.

Q. That is as far as any direction went?

A. Yes, sir. [93—78]

Q. I don't know whether I asked you before or not, did Frederickson have any authority or control over your horses and wagons and delivery outfit?

A. No, sir.

That is all.

Mr. DONOHUE.—I wish to ask Mr. O'Neill a few additional questions.

Q. Does the Blum-O'Neill Company still own the wagon Sully was driving when he met with this accident? A. Yes, sir.

Q. Have you recently made measurements of the wagon bed? A. Yes, sir.

Q. Will you state the dimensions of that wagon bed?

A. Behind the seat of the wagon, 62 inches long.

Q. And how wide? A. Thirty-nine inches.

Q. What is the width of the seat?

A. Fifteen inches.

Q. What is the space in the wagon bed between the seat and the footboard? A. Four inches.

Q. What is the width of the footboard?

A. Nine inches.



(Testimony of H. I. O'Neill.)

Q. You heard Mr. Sullivan's testimony this morning that Mr. Frederickson had piled or assisted in piling four cases of milk and three cases of butter upon the seat and footboard. Is that possible to have been done?     A. Impossible.

Mr. RAY.—Object to that.

The COURT.—He can testify to his opinion. Objection overruled. Exception allowed.

Q. What are the dimensions of a case of milk?

A. Nine and a half deep, thirteen by twenty long.  
[94—79]

Q. What are the dimensions of a case of butter?

A. Eight inches deep and, well I can't say positively, sixteen by twenty long.

Q. When you stated in answer to my previous question, it would be impossible, did you mean any possibility of it riding there with the wagon in motion?

A. It couldn't stay if the wagon was in motion.

Q. Mr. Sullivan testified that this additional stuff he speaks of was to go to the store to be kept there to fill short orders. What is your custom as to having three cases of butter at the store at the same time?     A. We never had that much.

Q. And the milk?

A. We would have two or three cases of milk.

Q. How much does a case of butter weigh?

A. Sixty pounds.

Q. And a case of milk?     A. Sixty-five pounds.

(Testimony of Fred Frederickson.)

Q. What kind of wood is the wagon made of?

A. I couldn't say.

That is all.

Witness excused. [95—80]

**Testimony of Fred Frederickson, for Defendant.**

FRED FREDERICKSON, called and sworn as a witness in behalf of the defendant, testified as follows:

Direct examination by Mr. DONOHOE.

Q. State your name and age?

A. Fred Frederickson, 33 years old.

Q. Where do you reside? A. Cordova.

Q. Are you acquainted with Mr. Sullivan?

A. I am.

Q. How long have you been acquainted with him? A. Since 1918.

Q. Are you acquainted with Mr. Harry O'Neill?

A. Yes, sir, I am.

Q. How long have you been acquainted with him?

A. Since 1917.

Q. And you are acquainted with the corporation, Blum-O'Neill Company? A. I am.

Q. Were you employed in Cordova by the Blum-O'Neill Company from October, 1921, to and including the fourth day of May, 1922? A. I was.

Q. In what capacity? A. As warehouseman.

Q. Who employed you? A. Mr. O'Neill.

Q. Where did you draw your salary?

A. From the Blum-O'Neill Company.

Q. What part of it?

(Testimony of Fred Frederickson.)

A. At the office in the general store. [96—81]

Q. Is there a telephone communication between the office, general store and warehouse?

A. There was telephone communications, yes, sir.

Q. Do you know in what service the plaintiff was engaged in while working for the Blum-O'Neill Company between October, 1921, and the fourth day of May, 1922?      A. As a deliveryman.

Q. What were your duties as warehouseman?

A. To check the incoming and outgoing freight; to keep the house clean and orderly; keep the stuff in piles, segregate it. Also put up the rail freight, the packing; kept the fires going.

Q. Under whose supervision were you?

A. Mr. O'Neill's.

Q. Did Mr. O'Neill visit the warehouse often?

A. Every day.

Q. What did you know Mr. O'Neill to be in this organization?      A. Manager.

Q. And you say he visited the warehouse every day?      A. He did.

Q. For what purpose?

A. To give me instructions.

Q. And you conducted the warehouse under his instructions?

A. To the best of my ability, yes, sir.

Q. When you were in doubt on any question or method of doing your business what did you do, if anything?      A. Called him up.

Q. Who?      A. Mr. O'Neill.

Q. How did you call him up?

(Testimony of Fred Frederickson.)

A. By telephone. [97—82]

Q. For what purpose?

A. To find what he wanted, what he wanted to do in the matter at hand.

Q. State some instances in which you would consult Mr. O'Neill?

Mr. RAY.—We object to the question. Incompetent, irrelevant and immaterial.

The COURT.—Objection overruled. Exception allowed.

A. If I was filling an order for the railroad; if I was in doubt as to what brand of goods was wanted to be put up, I would call him up and ask his advice.

Q. Were you authorized to sell small articles in the store?

A. In case somebody happened to drop in.

Q. Did you make some sales?

A. Once in a while.

Q. Was it your duty to go to the restaurants and get their orders daily?

A. I generally called on them, yes, sir.

Q. And you delivered that direct from the warehouse?

A. Yes, unless it had to go from the store.

Q. What would you do with the charge slips for goods like you delivered, for instance to the Model Restaurant?

A. I would put them in the back of the bill-book.

Q. Then what would become of them?

Mr. RAY.—We object to this as immaterial.



(Testimony of Fred Frederickson.)

The COURT.—Objection overruled. Exception allowed.

A. The bookkeeper would gather them up every day.

Q. Did you have any authority to direct Sullivan in the performance of his work other than to tell him when you had goods to go out?

A. No, sir, I generally called up the store in case I had something to deliver and couldn't deliver it myself. [98—83]

Q. And what would be the result of that?

A. They would send Sullivan up and he would come and take it.

Q. Mr. Sullivan, in his testimony this morning, if I remember rightly, seemed to state that he was directly under your supervision and control. Is that true? A. It is not.

Q. And he stated, I believe, that he reported to you practically for everything. Is that true?

A. No, sir.

Q. To what extent have you ever during the period between the month of October, 1921, and the fourth of May, 1922, ordered or directed Sullivan?

A. I never gave him any orders, except when he stepped in and I had something to deliver. He would take it. I would tell him about it.

Q. How were these orders filled in reference to your warehouse and in reference to the store where an order was turned into the store?

A. The repacks were filled at the store and de-

(Testimony of Fred Frederickson.)

livered from there. The heavies were picked up at the warehouse by Sullivan.

Q. What do you mean by the "heavies"?

A. Full cases, or sometimes half cases or sacks of flour or spuds.

Q. Full sacks?      A. Yes, sir.

Q. Did you have any control or supervision over the delivery apparatus, the horses, wagons, automobiles?

Mr. RAY.—Object to the question—it's leading.

The COURT.—Objection overruled. Exception allowed.      A. None. [99—84]

Q. Did you ever, at any time, direct Sullivan in connection with the horses and wagons or sleds and automobiles?      A. I never did.

Q. You were in the courtroom this morning when Sullivan was on the stand?      A. I was.

Q. You heard him testify that you had told him on the third day of May to hitch up the horse to the wagon the next day and abandon the sled. Did you give any such order?      A. I did not.

Q. Did you have any conversation at all with him that evening?      A. I did.

Q. Just state that conversation?

A. He said, "I think I will have the wagon out to-morrow," and I said, "Is that so?" He said, "Yes, Mr. O'Neill gave me instructions to get the wagon out."

Q. You and Sullivan were very good friends, were you not?      A. Yes, sir.

(Testimony of Fred Frederickson.)

Q. And you continued to be very friendly with him until after this suit was brought? A. I did.

Q. Do you remember Sullivan coming to the warehouse on the morning of the fourth of May?

A. Yes, sir.

Q. Did he take a load of goods from the warehouse? A. Yes, sir.

Q. You said that the term "repacks" were put up at the store, C and First Streets, and the heavies were put up by you at the warehouse. How did you learn what heavies were to be put up?

A. On local orders you mean?

Q. Yes. [100—85]

A. They were either phoned up or a memorandum sent up.

Q. Who were those memorandums sent up by?

A. Whoever happened to come up.

Q. The deliveryman, did he bring any up?

A. Sometimes.

Q. And you would fill it up there?

A. Yes, sir.

Q. What time did Sullivan appear at the store on the fourth day of May? A. I don't know.

Q. I mean, appear at the warehouse?

A. At nine o'clock, or a little before.

Q. Did he take any goods from the warehouse to the Carlisle Packing Company? A. He did.

Q. Did he take a wagon load?

A. About that, I guess.

Q. Was there anything said about the remaining part when he loaded on the first load?

(Testimony of Fred Frederickson.)

A. Yes, he said he was coming back to get the rest of it.

Q. How did he go after he left the warehouse on the first trip?     A. On leaving the warehouse?

Q. Yes.

A. He went down B to First, and then down to Carlisle.

Q. When did he return. How long after?

A. About an hour and a half or an hour and three-quarters.

Q. How did he come back?

A. He came down to the warehouse from Second Street.

Q. And he pleads in his complaint that you ordered him to back his wagon in. Was there anything done about that?

A. I didn't say anything about it at all. He backed in. [101—86]

Q. And you had the balance of the Carlisle outfit on a truck there?     A. I did.

Q. Who loaded it on the wagon?

A. I helped Sully load it on.

Q. What did that load consist of?

A. Six cases of eggs.

Q. Just describe how those six cases of eggs were loaded?

A. There were three cases shoved up in front toward the dashboard and three cases behind them again, and then four boxes of toast; sack of split peas; sack of Jap rice, set on top of the rice.



(Testimony of Fred Frederickson.)

Q. The eggs extended back—how long is a case of eggs?     A. Two feet four inches.

Q. And there were two cases, end to end?

A. Yes, sir.

Q. And it took up four feet, eight inches?

A. Yes, sir.

Q. Now, what was behind the eggs on the floor of the bed?

A. I don't remember exactly but I think that the tailboard—there was some toast sitting on the tailboard up against the eggs.

Q. And how big is a case of toast?

A. Cubic dimensions?

Q. No, dimensions, not cubic contents?

A. About one foot five by one foot six by one foot ten.

Q. That is one foot five in width, by one foot six in breadth and what is the length?

A. About one foot ten.

Q. Now you say there were some cases of toast piled on the eggs?     A. Yes, sir.

Q. Were they in the front or behind the seat?

A. Behind the seat. [102—87]

Q. Was there any part of the load piled on the seat?     A. No, sir.

Q. Any part piled on the dashboard or footboard?

A. No, sir.

Q. What would be the weight of those supplies you had put on the wagon?

A. Not more than 850 pounds. You understand

(Testimony of Fred Frederickson.)

the toast was big and bulky and might have looked more.

Q. Was there anybody else present there besides you and Sullivan when you were loading this wagon?

A. Yes, Dudley Allen.

Q. He's a salesman, is he?      A. Yes, sir.

Q. And did he remain there all the time until you loaded the wagon?      A. Yes, sir.

Q. What was said by you and Sully after the wagon was loaded?

A. There were several things said: I remember one thing in particular.

Q. In reference to the wagon or shipment of goods?

A. Yes, I said "Sully, if I were you I would drive up on Second Street."

Q. What did he answer?

A. "No," he said, "I think it is easy to go to First Street. It is only a little ways and it is down hill."

Q. What else did Sullivan say in your and Dudley Allen's presence in regard to taking any additional supplies, if anything?

A. He remarked that they asked him to bring down a case of milk when he came from the store.

Q. What did Sullivan do with reference to that, if anything?

A. He went and got a case of milk and put it on the wagon.

Q. Did you say anything about that case of milk?

A. I suggested that he had load enough and if

(Testimony of Fred Frederickson.)

they needed it bad they could come up and get it.  
[103—88]

Q. What did he say?

A. He said "One case more or less doesn't matter. I can take it."

Q. Well, did he take it?

A. Yes, he put it on the seat; on the left-hand side.

Q. Then what did he do, if anything?

A. He drove away.

Q. How did he get into the wagon?

A. He climbed up on the seat.

Q. On which end of the seat was he sitting?

A. On the right-hand side.

Q. Was there a brake on the wagon?

A. There was.

Q. Did Sullivan stop after he started from the door until he was run over?     A. He did not.

Q. What was the condition of the street from the warehouse up to Second Street as to snow?

A. Absolutely bare.

Q. No snow at all?     A. No, sir.

Q. You heard Sullivan's testimony that you called him to stop after he got away twenty feet. Is that true or false?     A. It is false?

Q. Did you load on any additional supplies at all?

A. I did not, after we finished loading the load.

Q. And that load going to Carlisle had no milk or butter?     A. It did not.

Q. And you say this last case—after you got through loading the Carlisle stuff that Sully said

(Testimony of Fred Frederickson.)

they wanted a case of milk down at the store and he would take it?     A. Yes, sir.

Q. Whereabouts was this milk piled?

A. On the other side of the warehouse. [104—89]

Q. How wide is the warehouse?     A. Fifty feet.

Q. I don't know whether I asked you this question, did you have or was it any part of your duties to look after the sleds and wagons and horses?

A. No, sir.

Q. Did you at any time exercise any authority over that branch of the business?     A. No, sir.

Q. Did you, while up at the warehouse, at any time between October, 1921, and the fourth of May, 1922, ever hire or pay off any men that worked there at the warehouse?     A. No, sir.

Q. You never did?     A. No, sir.

Q. You never had any such authority?

A. No, sir.

Q. You heard Mr. Sullivan's testimony in which he stated that you had hired and paid off men on short jobs. Is that true or false?     A. It is false.

Q. This load that Sullivan took on before he put on this case of milk. Was that a perfectly safe load?     A. I would consider it so.

Q. Do you remember visiting Sullivan at the hospital a few days after he was hurt?

A. I do.

Q. You had a conversation with him?

A. I had several conversations with him.

Q. Did you visit him very frequently in the hospital?     A. Yes, sir. [105—90]



(Testimony of Fred Frederickson.)

Q. And did Sullivan come around to the warehouse and chat with you? A. Yes, sir.

Q. Did he ever at any time claim to you that his accident was caused by your putting on any additional boxes on the wagon?

Mr. RAY.—We object to the question.

The COURT.—Objection overruled. Exception allowed.

A. No, sir.

Q. I will ask you this, that at the time you visited Sullivan in the hospital in Cordova a couple of days after the accident if you and he being present and no other persons if you had a conversation in substance as follows: "You said to Sullivan 'How did it happen, was it the horse's fault' and Sullivan said 'No, it was not the horse's fault, it was the street's fault.'" Did such a conversation and statement take place?

A. Yes, sir.

Q. Did you ever at any time instruct Sullivan how to load groceries on the wagon that was going out?

A. I never instructed him. I loaded him some times.

Q. Did you instruct him how to do it?

A. If I saw a better way than he was doing, I would probably suggest it.

Q. When there was considerable goods to go out you helped put them on? A. Yes, sir.

Q. And you did so with the Carlisle order this morning? A. Yes, sir.

(Testimony of Fred Frederickson.)

That is all. [106—91]

Cross-examination by Mr. RAY.

Q. When an order came up to the warehouse, before you said anything to Mr. Sullivan about it you would telephone to the store and ask their advice whether Mr. Sullivan should deliver that load or not? A. I don't quite understand you.

Q. Are you sure you didn't understand that question? I will repeat the question: Before you ever suggested, to use your language, to Mr. Sullivan that he take a load of groceries from the warehouse would you call up the store and ask advice about it?

A. If Mr. Sullivan was down there, yes.

Q. If Mr. Sullivan was at the warehouse before you permitted him to depart with a load of groceries, in carrying out an order, would you call up the store and ask whether he could take that order out?

A. No, Mr. Sullivan was the deliveryman and he would take out the orders that were ready to go.

Q. Did you ever telephone to the store and ask them whether Mr. Sullivan should take a load down to the Carlisle Packing Co.? A. Yes, sir.

Q. On May fourth?

A. Yes, sir, it was done on May 3d.

Q. Then you had the Carlisle order on May 3d.

A. Yes, sir.

Q. And did you say there is an order for the Carlisle Packing Company to be delivered to-morrow?

A. They sent him up from the store to take the order.

(Testimony of Fred Frederickson.)

Q. And you said nothing to Mr. Sullivan the evening before about this? A. No, sir. [107—92]

Q. And as far as you knew, he had no knowledge of the order until the next morning? A. No, sir.

Q. So you didn't say on May third, after you had knowledge of this Carlisle order that you had better put on wheels to-morrow; you have an order to take to the Carlisle Packing Co.?

A. I never said that?

Q. He had a pretty good load?

A. He had some, yes.

Q. You said he had load enough and it would be better for him to go up the hill to Second Street?

A. Yes, sir.

Q. And you made that suggestion? A. Yes, sir.

Q. At the time you went to the hospital Sully was lying on his back? A. Yes, sir.

Q. And you were friendly with Sullivan?

A. Always was.

Q. You didn't go to the hospital for the express purpose of getting something which you could testify to? A. No, sir.

Q. You are still in the employ of the corporation?

A. Yes, sir.

Q. A stockholder? A. I have a few shares.

Q. How long were you warehouseman?

A. Since February, 1919.

Q. Have you kept a stock account, inventory account?

A. We took inventory once a year. [108—93]

(Testimony of Fred Frederickson.)

Q. Did you keep a stock account of what goods you had in the inventory?

A. I checked it in and checked it out.

Q. Where would that report go, to the main office?

A. Yes, sir.

Q. You heard Mrs. Satterlee say something about purchasing some articles at the warehouse?

A. Yes, sir.

Q. Was there any license there?

A. We didn't conduct a retail store.

Q. What was done with the money?

A. It went to the company.

Q. And you made no account of the money as warehouseman, but did account as salesman?

A. As warehouseman.

Q. You were working as a salesman?

A. I am not a salesman.

Q. You were in charge of the warehouse, selling goods. You were the salesman?

A. A salesman is a man who travels and sells things.

Q. Don't you have salesmen in the store?

A. Yes, sir.

Q. And you were up there as a warehouseman?

A. Yes, sir.

Q. And not as a salesman?

A. No, sir.

Q. You say that Dudley Allen was there. Was Mr. Allen there at the time you say Sully went back and got the case of cream?

A. Yes, sir.

Q. There talking with you?

A. Yes, sir. [109—94]



(Testimony of Fred Frederickson.)

Q. And was he there all the time while the load was being put on?     A. Yes, sir.

Q. You saw the accident?     A. Yes, sir.

Q. Mr. Allen and yourself stood in the doorway?

A. Yes, sir.

Q. He wasn't half way up the block and saw Sully coming along and said "Hollo, Sully."

A. No, sir.

That is all.

The witness excused. [110—95]

**Testimony of Harold Lund, for Defendant.**

HAROLD LUND, called and sworn as a witness in behalf of defendant, testified as follows:

Direct Examination by Mr. DONOHUE.

Q. State your name and age?

A. Harold Lund, fifty-three.

Q. Where do you reside?     A. Cordova.

Q. How long have you resided in Cordova?

A. Fifteen years.

Q. Are you acquainted with Florence Sullivan, the plaintiff in this action?     A. I am.

Q. Where were you about eleven o'clock in the forenoon of May 4, 1922?

A. On the corner of First and B Streets.

Q. Were you standing on the sidewalk at that time?     A. Yes, sir.

Q. Did you see the Blum-O'Neill delivery wagon with Mr. Sullivan in it coming down the hill?

A. Yes, sir.

Q. What first attracted your attention to it?

(Testimony of Harold Lund.)

A. Well, I saw the horse jump.

Q. Did you see Mr. Sullivan at that time?

A. I did.

Q. Where was he?      A. On the seat.

Q. And shortly after that what happened?

A. Shortly after that I didn't see him. I stepped out into the center of the street and he was on the side of the wagon, outside the wagon, trying to get back on the wagon.

Q. How far was this from the cross-walk?

A. I don't know, it was between the warehouse and there. [111—96].

Q. What would you say it was, seventy or eighty feet?

A. I should judge it would be nearer sixty feet from the cross-walk to the warehouse.

Q. What was his position?

A. He was on the side of the wagon. He was working himself back and I thought he was going to make it. He finally got his foot on the front side of the wheel. He was getting on the seat again. I thought he was going to make it, but when he got down about to the cross-walk the wagon went into a snow cut that was right there at the cross-walk and he slid down off and the wheel went over his leg.

Q. When you first saw him he was working his way back up on the wagon?      A. Yes, sir.

Q. What would you say, could he have let go of the wagon and been perfectly safe?

A. Yes, I think he could have let go of the wagon.

(Testimony of Harold Lund.)

Q. This was after he was entirely out of the wagon?     A. Yes, sir.

Q. Are you a member of the city council?

A. Yes, sir.

Q. You are chairman of the street committee?

A. Yes, sir.

Q. Is it a portion of your duties to observe streets in Cordova?     A. Yes, sir.

Q. What would you say as to the condition of B Street from First up to the alley at the door of the Blum-O'Neill warehouse?

A. It was not in very good condition.

Q. What was on it?

A. There was considerable snow there. There are two buildings with flat roofs and they keep those shoveled off and then they cut a trail through that so that you can get through. [112—97]

Q. What would you say about it from the door of the Blum-O'Neill warehouse up to Second Street?

A. That was in good condition.

Q. Any snow on it?

A. If there was, very little.

Q. And along Second Street to C Street, what was that condition?     A. Good.

Q. And C Street to First?     A. Good.

Q. You had occasion to observe those streets?

A. I had men working all winter, more or less.

Q. What would you say whether driving the Blum-O'Neill wagon up the hill to Second Street as to whether that would be a safer or more dangerous way than driving down the hill to First Street?

(Testimony of Harold Lund.)

Mr. RAY.—Object to the question. Calls for a conclusion of the witness.

The COURT.—Objection sustained. Exception allowed.

Q. What would you say from your observation, Mr. Lund, whether it was safe to drive a wagon such as the Blum-O'Neill wagon down from the Blum warehouse to First Street on the fourth day of May, 1922?

Mr. RAY.—Same objection.

The COURT.—Objection sustained. Exception allowed.

Q. What would you say as to the grade of B Street from the cross-walk on First Street up to the middle of the warehouse?

A. The city engineer gives me 12 7/8 per cent.

Q. And from the warehouse up to Second Street?

A. The city plans show the same but it is not. I should judge it is about ten per cent.

Q. That would make three per cent difference?

A. Yes, on the other half of the block. [113—98]

Q. After reaching Second Street and going down toward C Street and then to First Street, how is the grade as to being steep or otherwise?

Mr. RAY.—We object for the reason that this is incompetent, irrelevant and immaterial.

The COURT.—Objection overruled. Exception allowed.

A. The grade is about five per cent, a slight grade.

Q. It is an easy street?



(Testimony of Harold Lund.)

A. Yes, you can go up there with a load easier than the other place.

That is all.

Cross-examination by Mr. RAY.

Q. What is your business?

A. Carpenter and builder.

Q. Did you drive a horse around the streets of Cordova on the 4th day of May? Ever drive a horse around the streets of Cordova?

A. No, sir.

Q. Never acted as a deliveryman?

A. No, sir, never did any delivering.

Q. You say that when you first noticed Sully he was behind the wagon?

A. No, sir, he was sitting on the seat.

Q. Then what did you notice?

A. Why, he shifted from the right-hand side to the left-hand side and the wagon tipped and he went off.

Q. Any boxes fall off with him?

A. I didn't notice any boxes. The only box—when I picked him up there was one box laying there. [114—99]

Q. Where was that box?

A. On First Street across the walk.

Q. How far would that be from the warehouse door? A. One hundred and fourteen feet.

Q. Did you see a box hit the horse and cause him to jump?

A. I didn't see anything like that?

Q. What direction did Sully come off the wagon?

(Testimony of Harold Lund.)

A. The right-hand side.

Q. How close was he to the wagon?

A. He was in the cut. He was close.

Q. He was running alongside the wagon?

A. He had his hand alongside the wagon dragging himself up again.

Q. Was the horse making any more jumps?

A. No, he was shaking his head but he wasn't jumping.

Q. He had quite a load?

A. Looked like quite a load.

Q. You didn't notice any boxes on the footboard?

A. I didn't see any.

Q. Did you see Sully under the wheels?

A. Yes, I saw the both wheels on both sides go over him. The front wheel went over him and the last wheel went over him.

Q. You didn't see him rolled along like a log?

A. No.

Q. How high was the bank of snow?

A. It stood six or seven feet high for half a block.

Q. And how far would that bank extend?

A. It left a driveway of ten feet. The street is thirty feet. It left an open cut of snow about ten feet. [115—100]

Q. How high the snow?

A. Six or seven feet.

Q. You gave the distance from where you were standing and the warehouse?

A. Yes, 114 feet.

(Testimony of Harold Lund.)

Q. You haven't looked up the grades of the streets?

A. I have been street commissioner for two years and know the streets.

Q. You presumably do work for Blum-O'Neill as for others?

A. I get most of their work, but I don't get it all.

That is all.

Witness excused. [116—101]

**Testimony of W. J. Kavanaugh, for Defendant.**

W. J. KAVANAUGH, called and sworn as a witness in behalf of defendant, testified as follows:

Direct Examination by Mr. DONOHUE.

Q. State your name and age.

A. Thirty-four, W. J. Kavanaugh.

Q. Where do you reside? A. Cordova.

Q. What is your business?

A. Work for the Alaska Transfer Company.

Q. How long have you been engaged with the Alaska Transfer Co.? A. About five years.

Q. What does the transfer company's business cover? A. General freighting, coal.

Q. Handle all the coal? A. Yes, sir.

Q. How many teams do they operate?

A. Four teams now.

Q. And you have been with the outfit for five years? A. Five years last January.

Q. Are you familiar with the streets of Cordova

(Testimony of W. J. Kavanaugh.)

as to grades and when the snow is on the ground as to snow?     A. Yes, sir.

Q. Were you familiar with the condition of B Street between First and Second Streets on the fourth day of May, 1922?     A. I was.

Q. You know of this accident occurring at the intersection of B and First Streets?

A. Yes, sir.

Q. Were you present shortly afterwards?

A. I was in front of our place. I saw the accident after he came down the hill. [117—102]

Q. Were you familiar with the condition of B Street from the warehouse of the Blum-O'Neill Co. up to Second Street?     A. Yes, sir.

Q. What was that condition as to snow?

A. It was practically bare.

Q. Were you familiar with the condition from the warehouse down to the intersection of First Street?     A. Yes, sir.

Q. What was the condition of that portion?

A. There was quite a lot of snow there on account of the snow being blown off the buildings.

Q. What would you say as being dangerous or not for travel with a wagon like the Blum-O'Neill delivery wagon?

Mr. RAY.—Object to the question. Calls for a conclusion.

The COURT.—Objection overruled. Exception allowed.

A. You mean dangerous to come down the hill?

Q. Yes.



(Testimony of W. J. Kavanaugh.)

A. I would say it was; yes, sir.

Q. You are familiar with horses pulling loads around the streets of Cordova? A. Yes, sir.

Q. You have had five years' experience in that?

A. Yes, sir.

Q. Are you acquainted with the horse hitched to the Blum-O'Neill wagon on the fourth day of May, 1922? A. Yes.

Q. What would you say of the ability of that horse to pull a load not exceeding one thousand pounds up B Street from the warehouse to Second Street and then down Second Street to C and down C to First?

Mr. RAY.—We object to the question. It's irrelevant. This man talking about the ability of a horse to pull a certain load up this or that street. [118—103]

The COURT.—Objection sustained. I think Mr. Kavanaugh has ample qualifications for the answer, but I think the question is wholly irrelevant to the issues. Exception allowed.

Mr. DONOHUE.—I am endeavoring to show that there were two routes which this man might have chosen and he deliberately chose the most dangerous one.

The COURT.—The objection is overruled. He may answer. Exception allowed.

A. I think he could do it very easily.

That is all.

Cross-examination by Mr. RAY.

Q. You are familiar with this wagon?

(Testimony of W. J. Kavanaugh.)

A. Yes, sir.

Q. How much does the wagon weigh?

A. We have done a lot of work on it. It is classed, I think, to hold a ton. It ought not to weigh—

Q. About a ton capacity?

A. I think it is classed for that.

Q. And a load of fifteen hundred pounds would be an ordinary load?     A. Yes, sir.

Q. It would not be too heavy a load for the wagon?     A. No, sir.

Q. And if you put five hundred pounds on that, on the seat and dashboard, what would you say then?

A. I would say the wagon was overloaded.

Q. This is a rather steep grade there?

A. Yes.     [119—104]

Q. It is not a very safe grade even for a team of horses with a good brake. It is a thirteen per cent grade?     A. Yes.

Q. Do you know the grade on Second Avenue?

A. It is a very small grade.

Q. You call five per cent a small grade?

A. Mr. Lund said it was that much. I didn't think it was.

Q. You say that between the warehouse and Second Avenue it was practically bare on May 4th?

A. Yes, sir.

Q. The only way you recall it is the accident occurred on that day. You couldn't tell me how

(Testimony of W. J. Kavanaugh.)

much snow was on the street the third day of April?     A. No, but there was a whole lot of it.

Q. Your attention has been directed to this date?

A. I looked it up for my own benefit to see what day we got our wagons out?

Q. So you were on wheels also?     A. Yes, sir.

Q. You didn't keep any record of this accident?

A. No, sir.

Q. And you had no diary as to the amount of snow. Was the snow honeycombed soft or hard?

A. I remember the day. It would naturally be hard.

Q. About how wide a cut would that leave in the snow?     A. Not over ten feet.

Q. And what would be the width of the wagon?

A. About five feet. Would not be quite that much. [120—105]

Q. And about how high was this snow piled on each side of the street?

A. I would say six or seven feet.

Q. Leaving an open cut through the snow?

A. Yes, sir.

Q. Had you driven up First Street with a wagon?

A. Yes, sir.

Q. And down it?     A. Yes, we go both ways.  
That is all.

Witness excused.

Mr. DONOHOE.—We now offer in evidence the deposition of Dudley G. Allen taken pursuant to stipulation.

(Testimony of W. J. Kavanaugh.)

Mr. RAY.—We will agree there is such a stipulation.

Mr. DIMOND.—We offer the stipulation with the deposition. May I read the stipulation?

The COURT.—You may.

### STIPULATION.

It is hereby stipulated and agreed by and between the above-named parties, acting by and through their respective attorneys of record, that the hereinafter set forth interrogatories may be telegraphed to Dudley G. Allen at Portland, Oregon, and his answers to these questions shall be written out and sworn to by the said Dudley G. Allen before a notary public or other officer authorized to administer oaths in the city of Portland, State of Oregon, and when these answers are [121—106] so written out, signed by Allen and sworn to before the notary public, or other person authorized to administer oaths, and the party administering the oath shall sign the same and attach his seal of office, that said affidavit shall be immediately mailed to the clerk of the court at Valdez, Alaska, and when received by said clerk may be published and read in evidence at the trial of said cause with the same force and effect as a deposition taken according to law would have.

All formalities to the taking and transmitting of this deposition are hereby waived, save and except as hereinbefore stated.



The questions to be put to the said DUDLEY G. ALLEN are as follows:

One. State your name and age.

Two. What is your business.

Three. Do you know Florence J. Sullivan, the plaintiff in this action, and Fred Frederickson?

Four. Were you present at the warehouse of The Blum-O'Neill Company on B Street in the town of Cordova on the fourth day of May, nineteen hundred and twenty-two when the said Sullivan was loading a load of groceries on the delivery wagon of the Blum-O'Neill Company.

Five. Did you hear a conversation between Frederickson and Sullivan relating to the loading of said wagon particularly in regard to the last case of milk put upon said load.

Six. State what was said by Frederickson and what was said by Sullivan in this regard in this conversation.

Seven. What did Sullivan then do.

Dated at Cordova, Alaska, this 29th day of January, 1923.

(Signed) FRANK H. FOSTER,  
Attorney for Plaintiff.

(Signed) DONOHUE & DIMOND,  
Attorneys for Defendant.

Mr. DIMOND.—Pursuant to which stipulation the following deposition was taken. It is addressed to the clerk of the District Court, Valdez, Alaska.  
[122—107]

**Deposition of Dudley G. Allen, for Defendant.**

Question 1. What is your name and age?

Answer. Dudley G. Allen; age 39.

Question 2. What is your business?

Answer. Merchandise broker.

Question 3. Do you know Florence J. Sullivan, plaintiff in this action, and do you know Fred Frederickson?

Answer. Yes.

Question 4. Were you present at the warehouse of the Blum-O'Neill Company on B Street in the town of Cordova on the 4th day of May, 1922, when the said Sullivan was loading a load of groceries on the delivery wagon of the Blum-O'Neill Company?

Answer. Yes.

Question 5. Did you hear a conversation between Frederickson and Sullivan relating to the loading of said wagon, particularly in regard to the last case of milk put upon said load?

Answer. Yes.

Question 6. State what was said by Frederickson and what was said by Sullivan in this regard in said conversation.

Answer. After Frederickson had stated that that was all for that load, which Frederickson and Sullivan had jointly put in the wagon, Sullivan said that he had to take another case of milk down to the store. Then Frederickson told Sullivan that he thought he had enough on that load. Sullivan

(Deposition of Dudley G. Allen.)

then said that he did not believe another case would make any difference. [123—108]

Question 7. What did Sullivan then do?

Answer. Sullivan went back in the warehouse and brought out a case of milk which he put on the seat of the wagon and then got up on the wagon and drove down the hill.

The foregoing questions I have answered truthfully to the best of my knowledge and belief. I remember the circumstances quite clearly in that I was witness to the entire happening and I sign my name below in the presence of a notary public.

(Signed) DUDLEY G. ALLEN,

Juneau, Alaska.

Subscribed and sworn to before me this thirtieth day of January, 1923.

[Seal] (Signed) A. A. McCLELLAN,

Notary Public.

My commission expires May 23, 1925.

Mr. DIMOND.—That is all.

Defendant rests.

**Testimony of Betty Satterlee, for Plaintiff (Recalled).**

BETTY SATTERLEE, a witness heretofore sworn and examined in behalf of plaintiff, recalled and testified as follows:

(By Mr. FOSTER.)

Q. When you saw the wagon coming down the hill, as you have testified, did you see Sully trying to climb on the wagon? A. No, sir.

(Testimony of Betty Satterlee.)

Mr. DONOHOE.—We object to that as not proper rebuttal. The witness has already testified to that. It is not rebuttal.

The COURT.—Objection overruled. Exception allowed. [124—109]

Q. Did you see Mr. Lund pick Mr. Sullivan up?

A. I did not. I think I was the first one to Sully and I picked him up as best I could myself.

Q. Did you see Mr. Lund there?

A. There were a number of people came directly and some one suggested they get a stretcher and take him to the hospital, and I held him in my lap until some one brought a stretcher.

Mr. FOSTER.—That is all.

Cross-examination by Mr. DONOHOE.

Q. Are you well acquainted with Mr. Lund?

A. No, not very much acquainted with him.

Q. Did you know him by name and sight previous to that time? A. I can't say I did.

Q. You say you heard someone suggest to go and get a stretcher? A. Yes, sir.

Q. It might have been Mr. Lund?

A. Yes, sir. The first person I recognized was Fred Frederickson and I think Mr. Frederickson helped to put him on a stretcher.

Q. And Mr. Lund might have been there?

A. I don't think he was there.

Q. You don't think Mr. Lund was there and saw this accident?

A. I know he was not there and picked Sully up.



Whether he was there and saw the accident I don't know.

Mr. DONOHOE.—That is all.

Mr. FOSTER.—That is all.

Plaintiff rests. [125—110]

Mr. DONOHOE.—If the Court please, I would suggest that that map be put in evidence. It has been used in the trial as an illustration.

The COURT.—It is usual to do it.

Mr. FOSTER.—It can be put in.

The COURT.—The map is submitted and will be marked Plaintiff's Exhibit "B."

### **Motion for Directed Verdict.**

Mr. DONOHOE.—We wish to make a motion and desire to argue that motion to some extent.

The defendant now moves this Court to instruct the jury to find a verdict for the defendant and against the plaintiff on the following grounds:

1. The complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant in this, that plaintiff in his said complaint has failed to plead facts sufficient if true, to make Fred Frederickson a vice-principal of the defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

2. The plaintiff has wholly failed to prove that said Fred Frederickson was a vice-principal of defendant or acted as vice-principal of defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

3. That it is clearly shown by the plaintiff's testimony that if said Fred Frederickson was guilty of any negligence it was the negligence of a fellow-servant and not that of the vice-principal of defendant. [126—111]

4. The evidence introduced by plaintiff clearly establishes the fact that plaintiff, by his conduct at and immediately before the time of the accident, assumed the risk which resulted in the accident which caused the injuries complained of.

5. That it is clearly established by the testimony of the plaintiff that the accident which caused the injuries complained of was brought about by the sole negligence of plaintiff and, therefore, he is guilty of contributory negligence which bars his right to recover in this action.

Motion for an instructed verdict was by the Court denied and defendant allowed an exception to the ruling.

WHEREUPON, counsel addressed the Court and jury, after which the Court read its instructions to the jury, as follows:

In the District Court for the Territory of Alaska,  
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

### **Instructions of Court to Jury.**

Gentlemen of the Jury:

Plaintiff sues to recover for damages for personal injuries suffered by him while in the employ of the defendant, alleging in his complaint that they are directly due to the negligence of the defendant corporation acting through its authorized agent.

Defendant answers denying any liability, alleging that plaintiff was injured solely through his own negligence, denying [127—112] that the corporation's agent was in any way responsible for the accident, and pleads further that if any act of the agent in question contributed to the injury he was the fellow-servant of plaintiff, for whose negligence the corporation would not be liable.

#### **2.**

Plaintiff having the affirmative of the issue it is incumbent upon him to prove, by a fair preponderance of the evidence, all the material allegations of his complaint. If he succeeds in doing this he will be entitled to a verdict for such sum as you may find will compensate him for any damages you may find were directly traceable to the injury complained of, not exceeding the amount named in his complaint. If plaintiff fails to sustain the allegations of his complaint by such preponderance of the evidence it will be your duty to return a verdict for the defendant.

#### **3.**

The general law governing the relations of employer and employee, or as more commonly stated,

of master and servant, is this: The master is bound to take reasonable care to provide for his servants a reasonably safe place or places to work, and to furnish them with reasonably suitable and safe tools with which to work. The servant assumes all the natural risks of his employment and if he is injured through the occurrence of a natural risk, without negligence on the part of the employer, he cannot recover since he assumed the risk when he entered the employment. When an unusual risk is encountered and a servant is injured the question then arises, through whose negligence the injury occurred.

Certain duties of the master are said to be non-delegable. By this is meant that such duties are personal to the master and [128—113] he cannot delegate them to a servant and then escape liability if the servant fails to perform or negligently performs the duty, on the ground that the negligent servant was a fellow-servant of the injured servant. In every jurisdiction in this country the rule is that if a duty is personal to the master the one to whom he entrusts the performance of this duty is called a vice-principal and the master is liable for his negligence in relation to such duties.

The meaning of this is that if the master entrust to an agent the performance of certain duties he cannot escape liability on the ground that the negligence was that of the agent and not of the master. This rule refers to the duties already stated, that of taking reasonable care to provide a reason-



ably safe place to work and to furnish reasonably safe and suitable tools and appliances. If the master, either by himself or through an agent, fails in any of these duties he is liable regardless of where the responsible negligence may lie, with one exception to be stated to you hereafter.

This rule as to nondelegable duties has given rise to what is known as the doctrine of vice-principal. A vice-principal is one who has general authority to represent the master in the direction of the master's work and who, because of such authority, is deemed by law to be vested with the nondelegable duties already described.

A vice-principal is one whom the master has clothed with power to act in his stead in the performance of a duty owing from the master to his servants, and for all his acts or omissions in respect of the matters in which he acts in the place of the master, in performing the master's duty, the master is [129—114] liable. Simply because one servant is superior in grade, rank, or authority does not make him any more the representative of the master than those lower in position. It is not grade or position that determines whether a servant is acting for and instead of the master, but the duty he is performing.

In every case the position of vice-principal must be determined by ascertaining whether the act performed or duty omitted is one the doing of which is charged by the master upon the servant; in other words, whether the servant has been put

in the place of the master as to the particular service performed or omitted.

The test whether in a given case an employee is to be regarded as a vice-principal or a fellow-servant is, not his title or rank or power to employ or discharge servants of the master, but the nature of the services which he performs. An employee, authorized to perform duties which are clearly the master's, is to that extent a vice-principal. In every case the controlling inquiry must be whether the act or omission resulting in injury involved the duty owing by the master to the injured servant.

4½.

The jury are instructed that a servant is as a general rule excusable for obeying orders in and about his master's business, when such orders are given by the master or by one in authority over the servant, as the representative of the master, unless the danger to be incurred by such obedience is so plain and manifest that no prudent person would attempt obedience, even under orders from one having authority over him, and although there be apparent danger in obeying the master's orders, yet such knowledge on the part of the servant will not, of itself, defeat a recovery, if the danger is not glaring and such as threatens immediate injury. [130—115]

5.

Fellow-servants are persons engaged in the same employment without any authority, one over another. A person entering into the employment

of another assumes the usual risks of the employment, excluding that of the negligence of the employer and including that of the negligence of his fellow-servants, whenever doing anything contemplated by his contract of employment.

If the jury find from the evidence that Frederickson had no authority to direct the plaintiff as to the manner in which he performed his work, then he was not a vice-principal but he and the plaintiff were fellow-servants and plaintiff cannot recover even though you should find that his injury was due in whole or in part to some negligent action of Frederickson. His right to recovery in this action is dependent upon his showing by fair preponderance of the evidence that he was subject to Frederickson's orders, and that Frederickson was responsible for the way in which the wagon was loaded, including the quantity of said load.

6.

You are instructed that it is not sufficient to entitle the plaintiff to recover in this case to show a negligent breach of duty on the part of defendant corporation or its responsible agent, but it devolves upon the plaintiff to show further that such breach of duty was the proximate or immediate cause of his injury. If the plaintiff in any important degree or way contributed to the accident he was guilty of what is known in law as contributory negligence. In such case the law disregards the negligence of the defendant and makes the negligence of the plaintiff a bar to his

recovery. You have already been instructed that a servant entering into employment assumes all the natural risks and hazards of the work. In this case if you [131—116] find that the accident was due to any unusual conditions you are to determine from all the evidence in the case whether or not plaintiff was so bound by the orders given him by Frederickson, if orders were given him, that he could not without disobeying orders so shape his conduct as to avoid the unusual risk. If he could have so acted in the emergency by the exercise of reasonable prudence and foresight such as may be expected of an ordinary man in a like situation, and failed to do so, he was guilty of contributory negligence and is not entitled to recover.

## 7.

As these definitions of the law are somewhat long I will sum them up into a brief statement, but you are not to take this brief statement alone but are to consider it in connection with the detailed instructions already given.

1. That plaintiff is entitled to recover if he has proven by a fair preponderance of the evidence that his injury was the result of an unusual risk which he assumed under the direct orders of a vice-principal of the defendant corporation, and that he was guilty of no contributory negligence which aided materially in producing the accident, that is, under the circumstances he acted as might be expected of an ordinarily prudent and careful man in his situation.



2. That plaintiff is not entitled to recover if you find: (a) that he was injured through an ordinary risk of the employment which risk he assumed when he entered the employment; (b) if he was injured through the act of a fellow-servant, that is the act of an employee who had no controlling authority over him in the circumstances; (c) if you find that his own negligence was an important contributing factor to the accident. [132—117]

## 8.

If you find that plaintiff is entitled to recover you will include in the amount of his recovery whatever reasonable sums he has paid for medical and hospital treatment; second, such sum as will compensate him for his loss of time from work; third, such sum as the jury may find he is entitled to receive for the mental and physical pain and suffering he has undergone as the result of his said injury. This latter sum is difficult of exact computation since pain and suffering can not be measured in money. The amount allowed is left to the sound discretion of the jury. The total amount must not exceed the amount asked in plaintiff's complaint, to wit, \$6,358.

## 9.

The rule of law is that where there are two methods by which a service may be performed, one perilous and the other safe, an employee who voluntarily chooses the perilous method rather than the safe one cannot recover for an injury thereby sustained; and I instruct you that if you

find from the evidence that the plaintiff could have chosen a route of going up B Avenue to Second Street and along Second Street to C Avenue and down C Avenue to First Street, instead of going down the steep grade over the ice and snow on B Avenue to First Street, and if you further find that the route down B Avenue to First Street was more dangerous than the route up B Avenue to Second Street, and that the plaintiff voluntarily and under no compulsion chose the more dangerous route, then plaintiff was guilty of such negligence as to bar his right of recovery in this action and you must find for the defendant.

## 10.

I instruct you that a master is not responsible for the neglect of an employee or agent in the performance of the [133—118] duties which are in no sense part of the master's work. The master may leave the carrying out of the details of the work to one of his servants, and at the same time, be not responsible for negligence of such servant.

## 11.

By the law of Alaska the jury are made the exclusive judges of the facts; that is, the weight of the testimony and the credibility of the witnesses. All questions of law involved in the trial are to be decided by the Judge, and the law makes it your duty to accept as law what is laid down as such by the Court. Your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in accordance with the rules of evidence.

It is your duty to give to the testimony of each and all the witnesses such credit as you consider their testimony justly entitled to receive, and in doing so, you should not regard the remarks or expressions of counsel, unless the same are in conformity with the facts proven, or are reasonably deducible from such facts and the law as given to you in these instructions.

Jurors are not artificial beings, governed by artificial or fine spun rules; you should bring to the consideration of the evidence your every day common sense and judgment, as reasonable men; and those just and reasonable inferences and deductions which you, as men, would ordinarily draw from facts and circumstances proven in the case you should draw and act on as jurors

Evidence is to be estimated not only by its own intrinsic [134—119] weight, but also according to the testimony which it is within the power of one side to produce and the other side to contradict, and, therefore, if the weaker and less satisfying evidence is produced when it appears that it was within the power of the party offering the same to produce stronger and more satisfying evidence, such evidence, if so offered, should be viewed with distrust.

E. E. RITCHIE,  
Judge.

Mr. RAY.—The defendant excepts to the instruction No. 9 just given by the Court with reference to the choice of routes which the plaintiff

might have taken as not applicable to this case, the instruction reading as follows:

“The rule of law is that where there are two methods by which a service may be performed, one perilous and the other safe, an employee who voluntarily chooses the perilous method rather than the safe one cannot recover for an injury thereby sustained; and I instruct you that if you find from the evidence that the plaintiff could have chosen a route of going up B Avenue to Second Street and along Second Street to C Avenue and down C Avenue to First Street, instead of going down the steep grade over the ice and snow on B Avenue to First Street, and if you further find that the route down B Avenue to First Street was more dangerous than the route up B Avenue to Second Street, and that the plaintiff voluntarily and under no compulsion chose the more dangerous route, then plaintiff was guilty of such negligence as to bar his right of recovery in this action and you must find for the defendant.”

Exception allowed.

Mr. DIMOND.—The defendant excepts to the second paragraph, not numbered, of the Court's instructions No. 5, reading as follows:

“If the jury find from the evidence that Frederickson had no authority to direct the plaintiff as to the manner in which he performed his work, then he was not a vice-principal but he and the plaintiff were fellow-ser-



vants and plaintiff can not recover even though you should find that his injury was due in whole or in part to some negligent action of Frederickson. His right to recover in this action is dependent upon his showing by fair preponderance of the evidence that he was subject to Frederickson's orders, and that Frederickson was responsible for the way in which the wagon was loaded, including the quantity of the load." [135—120]

This exception is based on the defendant's theory of the case that Frederickson had no authority to act for the principal as to any nondelegable duties of the defendant and did not so act. And the evidence shows that any directions Frederickson may have given plaintiff were given as an operative concerning the details of the work.

Exception allowed.

Mr. DIMOND.—The defendant excepts to the Court's instruction No. 6 in its entirety as given by the Court on the ground, as stated in the exception to the former instruction, and that it assumes the defendant is bound by all orders of Frederickson where as the defendant views the law Frederickson in giving such orders was not performing any of the nondelegable duties of the defendant. The instruction reads as follows:

"You are instructed that it is not sufficient to entitle the plaintiff to recover in this case to show a negligent breach of duty on the part of defendant corporation or its responsible agent, but it devolves upon the plaintiff

to show further that such breach of duty was the proximate or immediate cause of his injury. If the plaintiff in any important degree or way contributed to the accident he was guilty of what is known in law as contributory negligence. In such case the law disregards the negligence of the defendant and makes the negligence of the plaintiff a bar to his recovery. You have already been instructed that a servant entering into employment assumes all the natural risks and hazards of the work. In this case if you find that the accident was due to any unusual conditions you are to determine from all the evidence in the case whether or not plaintiff was so bound by the orders given him by Frederickson, if orders were given him, that he could not without disobeying orders so shape his conduct as to avoid the unusual risk. If he could have so acted in the emergency by the exercise of reasonable prudence and foresight such as may be expected of an ordinary man in a like situation, and failed to do so, he was guilty of contributory negligence and is not entitled to recover."

Exception allowed.

Mr. DIMOND.—The defendant excepts to the first paragraph, No. 1 of the Court's instructions No. 7:

"1. That plaintiff is entitled to recover if he has proven by a fair preponderance of the evidence that his injury was the [136—121]

result of an unusual risk which he assumed under the direct orders of a vice-principal of the defendant corporation, and that he was guilty of no contributory negligence which aided materially in producing the accident, that is, under the circumstances he acted as might be expected of an ordinary prudent and careful man in his situation."

upon the ground last above stated, and that it assumes the plaintiff was bound to follow the orders of Frederickson and that his injury so resulting might be used as a basis of plaintiff's negligence against the defendant. Exception allowed.

The defendant also excepts to the Court's instructions subparagraph 2 (b) of the Court's instructions No. 7, reading as follows:

"That plaintiff is not entitled to recover if you find \* \* \* (b) If he was injured through the act of a fellow-servant, that is the act of an employee who had no controlling authority over him in the circumstances."

Exception allowed.

Mr. DIMOND.—Defendant further excepts to the Court's instruction No. 8 in its entirety upon the ground that there is no substantial basis for it in the evidence, the instruction reading as follows:

"If you find that plaintiff is entitled to recover you will include in the amount of his recovery whatever reasonable sums he has paid for medical and hospital treatment; second, such sum as will compensate him for his loss

of time from work; third, such sum as the jury may find he is entitled to receive for the mental and physical pain and suffering he has undergone as the result of his said injury. This latter sum is difficult of exact computation since pain and suffering can not be measured in money. The amount allowed is left to the sound discretion of the jury. The total amount must not exceed the amount asked in plaintiff's complaint, to wit, \$6358."

Exception allowed.

Mr. DIMOND.—The defendant further excepts to the Court's refusal to give its requested instruction No. 2, reading as follows:

"You are instructed that the plaintiff's own testimony shows that he remained on the wagon to which he has testified [137—122] at the time when the wagon was being loaded by the defendant's employee, Fred Frederickson, and when he had ample opportunity to remove himself to a place of safety. By so doing the plaintiff knowing, as he has pleaded, the condition of the streets of the town of Cordova, and particularly the condition of B Street in said town, assumed all of the risks incident to his remaining on said wagon and attempting to drive with it down said B Street, and the defendant is not liable for the injuries plaintiff thus suffered."

Mr. DIMOND.—The defendant excepts to the Exception allowed.



refusal of the Court to give its requested instruction No. 4, reading as follows:

“I instruct you that a servant assumes the ordinary risks of his employment and is bound to exercise his own skill and diligence to protect himself, and unless you find from the evidence that the plaintiff exercised due skill and diligence to protect himself in choosing the route down B Avenue over the snow and ice in preference to the route of B Avenue to Second Street then you must find for the defendant.”

Exception allowed. [138—123]

I do hereby certify that I am the official court stenographer for the Third Judicial Division, Territory of Alaska; that as such I reported the proceedings had at the trial of the above-entitled cause, to wit, F. J. Sullivan vs. The Blum O'Neill Company, being cause No. C-246 of the records of the above-entitled court; that the above and foregoing is a full, true and correct transcript of the evidence introduced and the proceedings had at the trial of said cause.

Dated at Valdez, Alaska, this 5th day of May, 1923.

J. W. LENAHA. [139]

**Plaintiff's Exhibit "A."**

2 negatives (films) of fracture (both bones) left leg—F. J. Sullivan, Anchorage, Ala.

**SEED**

**X-RAY PLATE**

Date Jan. 12, 23. No. ....  
 Case .....  
 Tube Used .....  
 Exposure .....  
 Distance from Tube .....  
 Referred by Doctor .....  
 Development .....  
 Name F. J. Sullivan .....  
 Address .....  
 Diagnosis .....

The sensitive side of the plate should be placed  
 against the smooth side of the envelope.

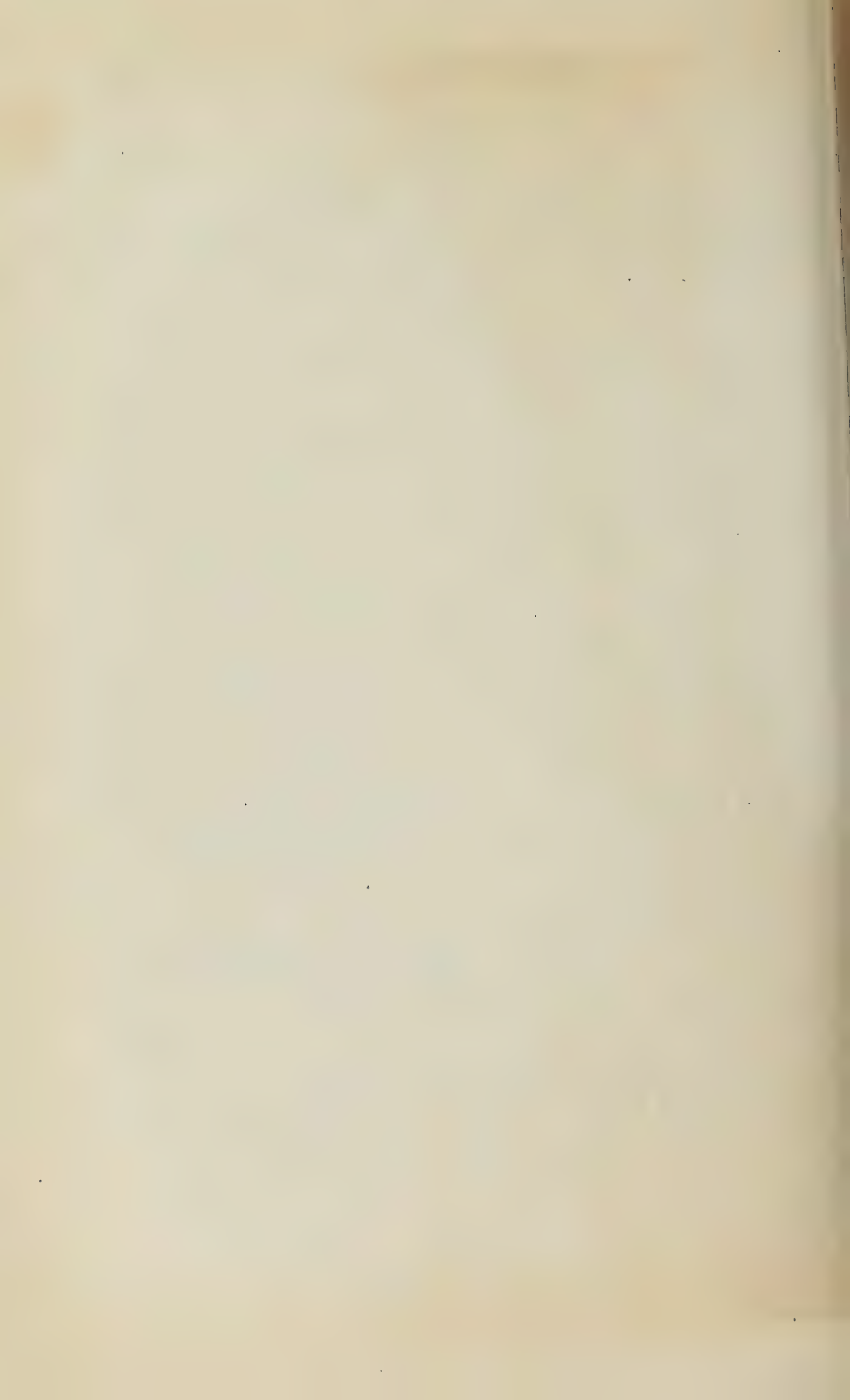
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This Outer Envelope can be the Container for  
 Finished Negative

K P 6560

(Also containing certificate by Dr. J. B. Beeson  
 concerning the two negatives contained herein and  
 of the break in the leg of F. J. Sullivan.)

J. L. B. Jr. [140]









Unimproved  
Property

SECOND

STREET

AVENUE

141

BLUM & Co. Building

AVENUE

15.0' Grade

ALLEY

BLUM OVERALL CO'S STORE

FIRST

STREET

1' Grade

1' 10" = 20' 10" = 40' 10" = 60' 10" = 80' 10" = 100'



**Defendant's Exhibit No. 1.**

**THE BLUM-O'NEILL COMPANY.**

Sold to CARLISLE PAK. CO.

Cordova, Alaska, 5/4/22.

		Checked 5-5-22.	Billed M-M	1156	
				Posted Paid	Page 21971
195#	20 c/s Milk Fed	Del from Dock			
44#	3 "	Olg Rolled Oats Lge Pkgs		5.35	\$107.00
25#	2 Am Cheese		44	7.30	21.90
82#	1 c/s S. Peas		2 Dz	.30	13.20
300#	1 " Cream-O-wheat			4.35	8.70
38#	5 " Tom. D. M. 2 1/2		10 Dz	2.60	9.50
35#	4 Cartons Snuff			.70	26.00
15#	1 c/s Velvet Tobacco		36	1.53	25.20
64#	1 " Sch Baking Powder		1 Gross 12 Oz	3.25	18.36
	2 " Lunch Tongue		2 Doz 8 Oz	5.35	6.50
			4 Oz		21.40
					<hr/>
					\$477.47

*vs. F. J. Sullivan*

## THE BLUM-O'NEILL COMPANY.

Sold to CARLISLE PAK CO.

Cordova, Alaska, 5/4/22.

	Priced WGB	Checked M M	Billed 5-5-22
12 # 4 Doz 2 Oz Cinnamon		1.60	6.40
100 # 1 Sak Split Peas	100 #	.09	9.00
165 # 5 Oats None			
100 # 4 Bxs. Sweet Toast Net	143 #	.30	42.90
100 # 2 " Ker Salt Mermaid		3.50	7.00
100 # 1 Sk Rice Jap	100 #		7.75
800 # 10 Cs Eggs		11.00	110.00
30 # 1 Bx Exp Apples	25	.22	5.50
(500 Paper Bags 20s	1½M	10.90	
70 # (500 " 12s	1½M	6.95	
(500 " 8s	1½M	5.20	
	Less 40		13.80
78 # 2 Rolls Paper 24 in.	78	.12	9.36
25 # 200 Eggs Carton & Fillen		.4	8.00
Paid			219.41



In the District Court of the Territory of Alaska,  
Third Division.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL CO., a Corporation,  
Defendant.

**Verdict.**

We, the jury duly empanelled and sworn in the  
above cause, do hereby find for plaintiff and against  
the defendant in the sum of Twenty-two Hundred  
and Fifty Dollars—\$2250.00.

WM. C. CUNNINGHAM,  
Foreman.

Filed in the District Court, Territory of Alaska,  
Third Division. Feb. 23, 1923. W. N. Cuddy,  
Clerk. By ———, Deputy.

Entered Court Journal No. 13, page No. 779.  
[143]

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In the District Court for the Territory of Alaska,  
Third Division.

No. C-246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

**Motion for New Trial.**

Comes now the above-named defendant and moves this Honorable Court for an order setting aside the verdict by the jury in this cause returned on the 22d day of February, 1923, and granting said defendant a new trial of said cause on the following ground:

First.—Insufficiency of the evidence to justify the verdict and that said verdict is against the law for the following reasons:

(a) That the complaint on which this action is based does not state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant in that it fails to state facts, if true, which could make Frederickson a vice-principal of the defendant, while on the other hand the facts stated in the complaint do make Fred Fredrickson a fellow-servant of the plaintiff in his performance of the alleged acts contained in the complaint, and there is no evidence introduced sufficient to establish plaintiff's claim that Fred Fredrickson was at the time in question performing any of the nondelegable duties owing by the defendant [144] to plaintiff; while all of the evidence tends to establish that if Fredrickson was in any way whatever responsible for the accident which caused the injury that plaintiff complains of, he, Fredrickson in that matter was acting as a fellow-servant of plaintiff it being clearly established by the evidence that if Fredrickson did direct the plaintiff to load the wagon in the man-

ner described in plaintiff's testimony that this was not a nondelegable duty of the defendant but was simply one pertaining to the duties of an operative in carrying out the details of the work and which was an act of a fellow-servant and not of a vice-principal.

(b) Plaintiff has wholly failed by any sufficient evidence whatever to prove that the placing upon the wagon of the alleged additional four cases of milk and three cases of butter was the proximate cause of the accident which resulted in the injury complained of. The plaintiff's testimony on this subject is that the wheels of the wagon cut thru the snow and tilted the wagon over so that the cases and plaintiff fell off the wagon, showing clearly that the accident was caused by the wheels of the wagon cutting thru the soft snow rather than by the loading of the additional cases upon the wagon.

(c) The evidence of the plaintiff clearly established that the plaintiff assumed the risk of the accident which caused the injury complained of. Plaintiff testified when speaking of the statement made by Fredrickson to him wherein he objected to taking these additional cases, "I objected to taking them." He said (meaning Fredrickson) "I would have to take them," he said, "I would have to take them or quit—somebody else would." On cross-examination plaintiff testified that he protested to Fredrickson against putting on the extra stuff. "I told him the wagon was loaded and no more could get on." He said, "Put them

on the footboard.” [145] “He placed them on the footboard and I put the four cases of milk on the seat.” This clearly establishes that the plaintiff realized the risk he was assuming and had ample opportunity to get off the wagon if he did not care to assume the risk and that he did voluntarily assumed any risk in connection with driving the delivery wagon in the manner in which it was then loaded.

Second.—Errors of law committed by the Court at the trial of said action and excepted to by the defendant as follows:

(a) The Court erred in admitting the X-ray picture, Plaintiff's Exhibit “A,” in evidence over the objection of defendant taken at the time on the ground that it was not proven to be a picture taken by an operator of an X-ray machine and had not been properly identified and that if it was an X-ray picture of the plaintiff's leg the time when it was taken was too remote from the trial and did not show the present condition of the plaintiff's leg. The evidence of the plaintiff on the subject was that an X-ray picture was taken on the 12th day of January, 1923, some five weeks before the trial. That the picture taken was developed in a dark room of Dr. Thompson's office at Anchorage, Alaska, while the plaintiff waited. That the picture that was taken was left in Dr. Beeson's possession and that Exhibit “A” is an X-ray picture sent to plaintiff shortly before the trial by registered mail, sent to the plaintiff from Anchorage, Alaska, to Valdez, Alaska. There is no evi-



dence showing that plaintiff's Exhibit "A" was the X-ray picture heretofore taken on the 12th day of January, 1923, of plaintiff's leg.

(b) The Court erred in overruling defendant's objection to the question put to Dr. Bulkley by plaintiff's attorneys as follows: "Handing you Plaintiff's Exhibit 'A' I will [146] ask you to examine that exhibit. From the examination you have made of plaintiff's leg what can you say as to the film." Mr. Dimond objected to the question as the witness had not shown himself competent to testify as to the film and we raised the same objection to this testimony as to the film because Dr. Beeson is not here to testify as to the taking of the same and the testimony is mere hearsay. Witness Sullivan is not competent to testify.

"You may state what that picture shows to you (referring to the X-ray picture)" to which question Mr. Dimond interposed the same objections as last stated, which objections were overruled by the Court and the exceptions allowed.

The Court erred in denying defendant's motion to strike all the testimony of Dr. Bulkley in regard to the X-ray picture, Plaintiff's Exhibit "A," from the testimony on the ground that there was no foundation for it in the pleadings and that the said X-ray picture, Plaintiff's Exhibit "A." had not been sufficiently identified to which ruling defendant excepted and the exception was allowed.

The Court erred in overruling the several other objections made by defendant to the introduction



of testimony offered by the plaintiff and in sustaining several other objections made by the plaintiff to the introduction of evidence offered by the defendant to which rulings of the Court the defendant then and there excepted and the exceptions were allowed, all of which more fully appears from the transcript and proceedings of the trial.

(c) The Court erred in denying defendant's motion made at the close of plaintiff's testimony for a nonsuit of plaintiff's cause of action which said motion for nonsuit is as follows:

"Comes now the above-named defendant, at the close of plaintiff's testimony and moves this Court for an order granting a nonsuit against the plaintiff and dismissing the case [147] following grounds:

1. The complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant in this, that the plaintiff in his complaint has failed to plead facts sufficient, if true, to make Fred Fredrickson a vice-principal of said defendant in his action and conduct in relation to the accident which caused the injury of which plaintiff complains.

2. That plaintiff has wholly failed by his evidence to prove that the said Fred Fredrickson acted as vice-principal in his action and conduct in relation to the accident which caused the injury of which plaintiff complains.

3. That it is clearly shown by plaintiff's testimony that if said Fred Fredrickson was guilty of

any negligence it was the negligence of a fellow-servant and not of a vice-principal.

4. That upon the evidence introduced by plaintiff it clearly establishes the fact that plaintiff, by his conduct at and immediately before the time of the accident, assumed the risk which resulted in the accident which caused the injuries complained of.

5. That it is established by the evidence of the plaintiff that the accident which caused the injury complained of was brought about through the sole negligence of plaintiff and, therefore, he is guilty of contributory negligence which bars his recovery against the defendant in this action."

To which ruling of the Court the defendant did then and there duly except and the exception was allowed.

(d) The Court erred in denying defendant's motion made at the close of all the testimony for an order directing the jury to find a verdict for the defendant and against the plaintiff, which said motion was as follows:

"The defendant, at the close of all the evidence, now moves this Court to instruct the jury to find a verdict for the defendant and against the plaintiff on the following grounds:

1. The complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant in this, that plaintiff in his said complaint has failed to plead facts sufficient, if true, to make Fred Fredrickson a vice-principal of the defendant

in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

2. The plaintiff has wholly failed to prove that said Fred Fredrickson, was a vice-principal of defendant or acted as vice-principal of defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains. [148]

3. That it is clearly shown by the plaintiff's testimony that if said Fred Fredrickson was guilty of any negligence it was the negligence of a fellow-servant and not that of the vice-principal of defendant.

4. The evidence introduced by plaintiff clearly establishes the fact that plaintiff, by his conduct at and immediately before the time of the accident, assumed the risk which resulted in the accident which caused the injuries complained of.

5: That it is clearly established by the testimony of the plaintiff that the accident which caused the injuries complained of was brought about by the sole negligence of plaintiff and, therefore, he is guilty of contributory negligence which bars his right to recover in this action."

To which ruling of the Court the defendant did then and there duly except and the exception was allowed.

(e) The Court erred in giving the second paragraph in the Court's instruction No. 5 to the jury

as the law governing any part of the evidence offered at the trial of this action for the reason that said instruction does not correctly state the law, in that the Court assumes that if Fredrickson had any authority to direct the plaintiff as to the manner in which the plaintiff performed his work then Fredrickson was a vice-principal of defendant and the Court further assumes in said instructions that if the plaintiff was subject to Fredrickson's orders or that Fredrickson was responsible for the way in which the wagon was loaded, including the quantity of said load then Fredrickson was a vice-principal of plaintiff which is not the law, to which portions of said instruction No. 5 defendant excepted in the presence of the jury and said exception was allowed. The portion of instruction No. 5 excepted to is as follows:

“If you find from the evidence that Fredrickson had no authority to direct the plaintiff as to the manner in which he performed his work, then he was not a vice-principal but he and the plaintiff were fellow-servants and plaintiff cannot recover even though you should find that his injury was due in whole or in part to some negligent action of Fredrickson. His right to recover in this action is dependent upon his showing by fair preponderance of the evidence that he was subject to Fredrickson's orders, and that Fredrickson was responsible for the way in which the wagon was loaded, including the quantity of said load.” [149]



While the instruction reads 'if the jury finds from the evidence that Fredrickson had no authority to direct the plaintiff, etc.,' the jury must have understood it to be that if they found that if he did have authority to direct the plaintiff in his work, then Fredrickson was a vice-principal and this construction of the law is directly opposed to the well-established principle of law governing masters and servants. In this matter as shown by the evidence, Fredrickson and the plaintiff were carrying out the details of their work, that is the operative part of the work and the acts complained of in regard to what Fredrickson may have done pertain merely to the duties of an operative and not a nondelegable duty of the defendant.

(f) The Court erred in giving instruction No. 6 to the jury as the law governing any part of the evidence offered at the trial of this action, for the reason that said instruction does not correctly state the law and is contrary to the law governing the evidence offered at the trial of this cause, to which instruction the defendant excepted to in the presence of the jury and said exception was duly allowed. Said instruction No. 6 is as follows:

"You are instructed that it is not sufficient to entitle the plaintiff to recover in this case to show a negligent breach of duty on the part of defendant corporation or its responsible agent, but it devolves upon the plaintiff to show further that such breach of duty was the proximate or immediate cause of his injury. If the plaintiff in an important degree or way



contributed to the accident he was guilty of what is known in law as contributory negligence. In such case the law disregards the negligence to the defendant and makes the negligence of the plaintiff a bar to his recovery. You have already been instructed that a servant entering into employment assumes all the natural risks and hazards of the work. in this case if you find that the accident was due to any unusual conditions you are to determine from all the evidence in the case whether or not plaintiff was so bound by the orders given him by Fredrickson, if orders were given him, that he could not without disobeying orders so shape his conduct as to avoid the unusual risk. If he could have so acted in the emergency by the exercise of reasonable prudence and foresight such as may be expected of any ordinary man in a like situation, and failed to do so, he was guilty of contributory negligence and is not entitled [150] to recover. The jury are instructed that a servant is as a general rule excusable for obeying orders in and about his master's business, when such orders are given by the master or by one in authority over the servant, as the representative of the master, unless the danger to be incurred by such obedience is so plain and manifest that no prudent person would attempt obedience, even under orders from one having authority over him, and although there be apparent danger in obeying the mas-

ter's orders, yet such knowledge on the part of the servant will not, of itself, defeat a recovery, if the danger is not glaring and such as threatens immediate injury."

In this instruction the Court leaves the question to the jury to find out as to whether or not the plaintiff was bound by the orders given him by Fredrickson, and that he could not without disobeying orders so shape his conduct as to avoid the unusual risk. The plaintiff shows that he realized the risk of taking on the alleged additional load and that he was told that he could take it or quit. Therefore, the plaintiff had ample opportunity to decline taking the said additional load but he voluntarily assumed any risk that was entailed thereby. The uncontradicted testimony establishes that Fredrickson did not have authority to hire or discharge the plaintiff or any other employee of the defendant and the evidence further shows that if Fredrickson did give any such orders they concerned the details or operative part of the work for which Fredrickson and the plaintiff were employed by the defendant and were not orders concerning any nondelegable duty of the defendant.

(g) The Court erred in giving paragraph No. 1 of instruction No. 7 to the jury as the law governing any part of the evidence offered at the trial of this action for the reason that said instruction does not correctly state the law and is contrary to the law governing the evidence in this case to which portion of said instruction No. 7 the defendant excepted in the presence of the jury and said

exception was allowed. The portion of instruction No. 7 thus excepted to is as follows: [151]

“That plaintiff is entitled to recover if he has proven by a fair preponderance of the evidence that his injury was the result of an unusual risk which he assumed under the direct orders of a vice-principal of the defendant corporation, and that he was guilty of no contributory negligence which aided materially in producing the accident, that is, under the circumstances he acted as might be expected of an ordinary prudent and careful man in his situation.”

This instruction is not the law governing the evidence in this case for the reason that the Court instructed the jury in effect that if Fredrickson had authority to give the plaintiff any instructions whatever as to the manner in which he performed his work then Fredrickson was a vice-principal of the defendant which is not the law. The evidence clearly establishes that any of the alleged instructions given by Fredrickson to plaintiff were not instructions concerning nondelegable duties of the defendant but were instructions only concerning the details of or operative part of the work being performed by Fredrickson and the plaintiff under their employment by the defendant and in that matter Fredrickson was a fellow-servant of the plaintiff. Said instruction is also contrary to the law because the Court leaves it to the jury to determine whether the plaintiff was guilty of contributory negligence, which under the testimony of

plaintiff should not have been done. Plaintiff's testimony clearly shows that he knew of the danger driving down B Avenue with the wagon loaded as he testified it was loaded and the uncontradicted testimony of Lund, a witness for the defendant shows that no careful or prudent man would have driven the wagon down B Street loaded as the plaintiff claims this wagon was loaded.

(h) The Court erred in giving subdivision (B) of paragraph 2 of instruction No. 7 to the jury as the law governing the evidence in this case for the reason that said portion of said instruction No. 7 does not correctly state the law as applied to the evidence in this case, to which portion of said instruction the defendant [152] in the presence of the jury duly excepted and the exception was allowed. Said portion of said instruction is as follows:

“If he was injured through the act of a fellow-servant, that is the act of an employee who had no controlling authority over him in the circumstances.”

This portion of said instruction is a summary statement of the law given by the Court to the jury governing the relations of master and servant and purports to be a definition of what a fellow-servant is. It in effect tells the jury that Fredrickson was not a fellow-servant of the plaintiff if Fredrickson had any control or authority over him. The instruction is vague and misleading as to the words “control and authority,” and the jury might well have taken such words to mean any authority



to direct the plaintiff in any manner as to the performance of his work which is not the law governing the evidence in this case or covering generally the relations of master and servant.

(i) The Court erred in giving instruction No. 8 to the jury as the law governing any part of the testimony in this case offered at the trial for the reason that the same does not correctly state the law in that there is no grounds or substantial basis in the evidence on which the jury could base a verdict in favor of the plaintiff and against the defendant for any sum whatever. To this instruction the defendant duly excepted in the presence of the jury and the exception was allowed. Instruction No. 8 is as follows:

“If you find that plaintiff is entitled to recover you will include in the amount of his recovery whatever reasonable sums he has paid for medical and hospital treatment; second, such sum as will compensate him for his loss of time from work; third, such sum as the jury may find he is entitled to receive for the mental and physical pain and suffering he has undergone as the result of his said injury. This latter sum is difficult of exact computation since pain and suffering cannot be measured in money. The amount allowed is left to the sound discretion of the jury. The total must not exceed the amount asked in plaintiff’s complaint, to wit, \$6358.00.”

(j) The Court erred in refusing to give defendant’s instruction No. 2 requested by the defendant



to be given to the [153] jury for the reason that the same is not covered by other instructions given by the Court and should have been given to the jury as the law governing plaintiff's assumptions of risk under all the evidence offered at the trial. Said requested instruction No. 2 is as follows:

“You are instructed that the plaintiff's own testimony shows that he remained on the wagon to which he has testified at the time when the wagon was being loaded by the defendant's employee Fred Fredrickson, and when he had ample opportunity to remove himself to a place of safety. By so doing the plaintiff, knowing, as he has pleased, the condition of the streets of the town of Cordova, and particularly the condition of B Street in said town, assumed all of the risks incident to his remaining on said wagon and attempting to drive with it down said B Street, and the defendant is not liable for the injuries plaintiff thus suffered.”

To which refusal of the Court the defendant duly excepted in the presence of the jury and the exception was allowed.

(k) The Court erred in refusing to give instruction No. 4 requested by the defendant to be given to the jury for the reason that the law therein contained is not covered by other instructions given by the Court and should have been given by the Court to the jury as the law covering the plaintiff's assumption of risk and his contributory negligence as shown by the evidence offered at the trial. Said requested instruction No. 4 is as follows:

“I instruct you that a servant assumes the ordinary risks of his employment and is bound to exercise his own skill and diligence to protect himself and unless you find from the evidence that the plaintiff exercised due skill and diligence to protect himself in choosing the route down B Avenue over the snow and ice in preference to the route of B Avenue to Second Street then you must find for the defendant.”

To which refusal of the Court the defendant duly excepted in the presence of the jury and the exception was allowed.

Dated at Valdez, Alaska, this 26th day of February, 1923.

DONOHOE & DIMOND,

Attorneys for Defendant.

Receipt of the foregoing “motion for a new trial” is hereby acknowledged by receipt of copy of same duly certified to as such true copy by Anthony J. Dimond, one of the attorneys for the defendant.

Dated at Valdez, Alaska, February 26, 1923.

L. V. RAY,

One of Attorneys for Plaintiff.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 6, 1923. W. N. Cuddy, Clerk. By ———, Deputy. [154]

February 1, 1923, Term of Court, Valdez, Alaska,  
June 6, 1923—38th Court Day.

In the District Court for the Territory of Alaska,  
Third Division.

No. C-246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

**Minutes of Court—June 6, 1923—Order Denying  
Motion for New Trial.**

Defendant's motion for a new trial of this cause having been heretofore argued by counsel and taken under advisement by the Court, after consideration thereof said motion is by the Court denied, to which order and ruling of the Court the defendant then and there excepted and the exception was by the Court allowed. [155]

In the District Court for the Territory of Alaska,  
Third Division.

No. C-246.

J. F. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

### **Opinion on Motion for a New Trial.**

Various assignments of error are set up by counsel for defendant in support of its motion for a new trial, but I am satisfied that only one error, if any, was made by the Trial Court, and that may have been in denying the motion for an instructed verdict at the close of all the evidence. I think the motion for a nonsuit was properly denied at the end of plaintiff's evidence because it appears to me that the positive testimony of the plaintiff, corroborated in some degree by Mrs. Satterlee, made a *prima facie* case. After carefully reading the motion for a new trial I am unable to agree with counsel that there was any important error made in the admission or exclusion of evidence or in the instructions.

The question of the correctness of the Court's action in denying the motion for an instructed verdict at the close of all the evidence has been a very perplexing one and I am not yet fully assured that I was right in denying that motion.

Under the conflicting authorities a cogent argument can be made either way with probably almost an even balance of precedents. I have decided to stand by the ruling denying the motion for the reason that the general tendency of Courts of late years has been to leave every disputed question of fact to the jury. This is true [156] even in jurisdictions which do not have the provision of the Alaska code that the jury are the exclusive judges of the facts and of the credibility of the witnesses. The modern rule is laid down by the Supreme Court in *Kreigh vs. Westinghouse*, 214 U. S. 249-258:

“Questions of negligence do not become questions of law to be decided by the Court, except ‘where the facts are such that all reasonable men must draw the same conclusion from them, and the case is not to be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Gardner vs. Mich. Cent. Railroad*, 150 U. S. 349, 361.”

It is true that the question raised by the motion for an instructed verdict is not wholly one of negligence. It involves the question of the alleged representative character or vice-principalship of *Frederickson*, which is a question of mixed law and fact. Nevertheless, in view of the decisive conflict in the evidence both as to *Frederickson's* authority and as to his actions and those of the



plaintiff immediately preceding the accident complained of, it appears to me that under the modern rule there was sufficient evidence on that point to go to the jury. In arguing that Frederickson was clearly a fellow-servant of Sullivan, which was without doubt generally true, defendant's counsel overlooked the principle of law laid down by themselves:

“Whether an injury to a servant was caused by the negligence of a fellow-servant depends upon the nature of the action in the performance of which the employee was negligent, and not upon the employee's rank or grade.”

(*Mast. vs. Kern*, 54 Pac. 950, and other cases.)

The rule is well stated by Labatt, volume 4, sections 1434–1435:

“Sec. 1434. Representative character of servant depends on the actual functions discharged by him.—Whether the employee whose negligence caused the injury was or was not a vice-principal is determined by the nature of the functions which he was, as a matter of fact, discharging at the time when the injury was received, and not by the appellation by which he was designated. His official [157] denomination will not, of itself, determine whether or not he was a representative of the master. Nor does a rule the effect of which is to cast upon him certain functions under the circumstances specified operate so as to alter the legal relations which would, apart from the rule, be held to exist between him and the

other employees. Nor is the fact that the injured servant believed the negligent employee to be a vice-principal, and was not aware that he had been discharged in that capacity, a sufficient ground for allowing the action to be maintained. Nor will the mere fact that the subordinate believed in good faith that he had been told by the employer to obey the directions of another employee enable the subordinate to recover for the negligence of that employee, if, as a matter of fact, no such instructions were given.

The mere fact that a vice-principal exercised his authority through an intermediary clearly cannot affect the extent of the employer's responsibility. Nor is it material, in a case where injury was caused by following the directions of a vice-principal, that he himself was temporarily absent when those directions were being carried out.

Sec. 1435. Temporary vice-principals.—Both on principle and authority it is manifest that a master is no less responsible for the negligence of an employee who is temporarily filling the position of an *alter ego* than he is for the negligence of an employee who holds that position permanently.

In determining the question whether the relation of temporary vice-principalship existed between the negligent and injured persons at the time of the accident, the essential circumstance to be considered is the nature

of the functions discharged by the alleged vice-principal. In some instances the exercise of those functions will have resulted from his compliance with the provisions of a rule, the effect of which was that, in a specified contingency, he was to exercise certain powers. In such cases the employer incurs no responsibility unless, at the time of the accident, the subordinate had actually passed under the control of the temporary vice-principal. Nor will the substitute be considered a vice-principal if it is apparent that he was not exercising some power or function which was an essential attribute of the position held by the employee whose place he had taken.

Since the powers of a temporary vice-principal can in no case be greater than those of the permanent one, the master is not responsible if those powers are exceeded by the substitute."

In section 1433, the same learned author, in discussing generally the application of the fellow-servant rule, makes the following forceful statement regarding the conflict of authority: [158]

"Sec. 1433. General Statement.—None of the courts, even those which have applied the doctrine of common employment in its most rigorous and sweeping form have gone to the length of asserting that it is absolutely and invariably controlling in all cases in which a master is being sued for injuries caused by the negligence of a fellow-servant of the injured

person. It is conceded that a portion, at least, of those cases are governed by the rule embodied in the maxim, *respondeat superior*. But with regard to the precise extent of the domain which is covered by each of these two antagonistic principles, there is an extraordinary diversity of judicial opinion. The decisions on the subject, indeed, are conflicting to a degree which, it may be safely affirmed, is without a parallel in any department of jurisprudence. To attempt to reconcile these decisions, or even to suggest grounds upon which, as rulings with respect to specific facts, they may be reconciled, would be to attempt an impossible and unfruitful task. The utmost that the commentator can aim at, with any hope of attaining success, is to group the authorities under categories which will enable the reader to comprehend, as nearly as may be, the extent to which the courts diverge from, or agree with, one another in regard to the various subsidiary issues through which an answer to the main question has been sought."

The position taken by this Court is the following: In view of the hopelessly conflicting precedents on this subject, not only in different jurisdictions but in the same jurisdiction over and over again, the proper rule to adopt is to follow the modern authorities. The fellow-servant rule in the earlier years of its history never gave rise to any such decisions as those quoted by counsel for defendant. The Whelan case, the Martin case and



the Peterson case, and other similar cases so strongly relied on by counsel, were all decided in the last decade of the nineteenth century when the Supreme Court, as then constituted, overruled repeated decisions made by the same court. Many of the federal and state courts made similar decisions in that decade and the one following, using the Supreme Court decisions as authorities. It is true that none of those cases has been expressly overruled but the Supreme Court itself in the last decade and a [159] half has made repeated decisions so utterly inconsistent with those cited that the action of the court amounts to overruling the earlier ones. The most decisive case is the one already quoted, that of *Kreigh vs. Westinghouse*. The opinion by Mr. Justice Day contains statements which amount to a denial in argument of the position taken by the court in the cited cases. For example, the following:

“The duty of providing a reasonably safe place for the carrying on of the work is a continuing one, and is discharged only when the master furnishes and maintains a place of that character. As late as *Santa Fe & Pacific R. R. Co. vs. Holmes*, 202 U. S. 438, it was declared: The duty is a continuing one and must be exercised whenever circumstances demand it.’

Where workmen are engaged in a business, more or less dangerous, it is the duty of the master, to exercise reasonable care for the safety of all his employees, and not to expose them to the danger of being hurt or injured



by the use of a dangerous appliance or unsafe place to work, where it is only a matter of using due skill and care to make the place and appliances safe. There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer. *Choctaw, Oklahoma & R. R. Co. vs. McDade*, 191 U. S. 64, 66, and cases there cited. \* \* \*

If the negligence of the master in failing to provide and maintain a safe place to work contributed to the injury received by the plaintiff the master would be liable, notwithstanding the concurring negligence of those performing the work. *Grand Truck R. R. Co. vs. Cummings*, 106 U. S. 700; *Deserant vs. Cerrillo Coal Railroad Co.*, 178 U. S. 409, 420, and cases there cited.

It is further argued that the testimony shows that the injuries to the plaintiff were solely caused by the negligence of the man operating the derrick in giving it a sudden and strong push toward the north wall, where the plaintiff was standing when injured, and it is contended that the derrick could not have injured the plaintiff but for the negligent operation thereof by the fellow-servants of the plaintiff using the same. But here again we think the question was one for the jury to determine."

The last sentence quoted, I think states the modern rule. The law changes gradually and has

been changing for centuries with the growth of civilization and the development of different [160] conditions in society and different ways of viewing social and economic questions. The extreme position taken by the courts at the end of the nineteenth century in making a fetish of the fellow-servant rule was so repugnant to the popular sense of justice that legislation quickly followed abolishing the fellow-servant rule in many cases. This was done both by congress and by the states. Many of the states have abolished the rule wholly. Following this change in public opinion, not to say the public conscience, the courts have receded from the extreme views of a quarter of a century ago. They have done this even where no new statute compelled it. The change in the decisions of the Supreme Court is the strongest testimonial to this fact. The most striking instance is *Kreigh vs. Westinghouse*. In that case a nonsuit was granted by the Circuit Court for the western district of Missouri and this judgment was affirmed by the Circuit Court of Appeals of the Eighth Circuit, in an opinion by Judge Sanborn. Judge Sanborn is admittedly one of the ablest Circuit Judges in the country but he still retains the views on the fellow-servant rule which prevailed two or three decades ago. When the *Kreigh* case went to the Supreme Court the decision of both lower courts was reversed and the case remanded for a new trial. The decision was unanimous and much of the opinion by Mr. Justice Day has already been

quoted. I mention this because counsel relies so strongly on certain opinions by Judge Sanborn.

The issue presented to the Court on this part of the motion for a new trial is contained in the following disputed testimony: Plaintiff testified that when he had a large load on his wagon and had driven a short distance from the warehouse into the street he was stopped by Frederickson and told to take several [161] cases of goods to the store on First Avenue. Plaintiff insisted he had load enough already and could not carry any more; that Frederickson insisted he should take the other articles and proceeded to throw them upon the footboard of the wagon, some of them being left there and others being placed upon the seat; that just as this was done the horse started down the hill and plaintiff was unable to control the animal because of his position among the boxes on the seat, and that the accident was caused by this fact. On the other hand Frederickson testified that Sullivan himself, after he was loaded, proposed to get another case of goods and did so although Frederickson told him he had load enough already. Frederickson also claimed that he advised Sullivan to drive up to Second Avenue, which was clear of snow. If Frederickson's testimony is correct Sullivan was clearly guilty of contributory negligence and his action would be barred on that ground if no other. Frederickson was corroborated to some extent by Dudley Allen and Sullivan in a slight degree by Mrs. Satterlee. Surely this conflicting testimony presented an issue of fact

which was for the jury to determine unless the admitted facts or testimony of the plaintiff was such as to make it the duty of the court, as matter of law, to decide that Frederickson in all he did was a fellow-servant of Sullivan, in which case the defendant corporation would not be liable. It is not disputed that the fellow-servant rule and the law of the assumption of risk and contributory negligence all apply to this case, since none of them in the kind of employment in which Sullivan and Frederickson were engaged is in any way affected by any statute.

It is to be determined by the Court then if facts were presented which required the submission to the jury of the issue whether or not Frederickson in the action he took was a vice-principal of the defendant corporation. It is only on the [162] testimony of the plaintiff that such a finding could be made. Plaintiff's testimony was positive and he was unimpeached except so far as he was contradicted by other witnesses. Certainly there was an issue of fact to be decided. The question is, was it a question of fact for the Court to submit to the jury? I think it was. Whatever may be my personal opinion of the weight of the evidence or the preponderance of the evidence, all questions of fact are for the jury. The law already quoted lays down the rule that even a fellow-servant may for a brief time be discharging a duty of the employer, and I cannot agree as counsel argue, following the statement of Judge Sanborn in *Union Pac. vs. Marone*, 246 F. concerning the difference



between operation and provision, that accepting any state of the facts, whatever was done by Sullivan and Frederickson were acts of operation and not of provision. It is seldom that any decision emphasizes as strongly as does Judge Sanborn's in the Marone case the distinction between operation and provision. As a matter of fact in many cases it appears to me that one runs into the other so it is difficult to draw a line of demarcation between them, and that this is one of those cases.

Plaintiff's case rests upon his claim that his place to work was rendered unsafe by the action of Frederickson; that he was under Frederickson's orders so far as Frederickson chose to give them in the matter of loading the wagon and the quantity of load he carried; that he protested against the additional load and before he had an opportunity to adjust himself to the situation the horse started and he was then compelled to do the best he could under the circumstances. It is argued by counsel for defendant that he could have quit his job. It might be argued also that he could have jumped out of the wagon and let the horse and wagon go. This latter act would have been criminal negligence because of the danger to people in the street. As for quitting his job under the circumstances, he had practically no time to think and it is another accepted rule of law that when a [163] servant is injured in obeying a sudden order which places him in a dangerous situation the master is liable. (See Labatt, Sec. 1357, etc.)



This presents to me the following situation: If plaintiff's testimony is true his place of work was made unnecessarily dangerous on short notice without his having sufficient time either to protect himself or to decide that he was not willing to accept the risk. It was a dangerous situation suddenly forced upon him by a person who had sufficient authority over him to place him in that situation. In creating that situation Frederickson was acting for the employer of both men. He was fixing the place where Sullivan had to work. He was acting for the corporation and he did not take reasonable care to provide a reasonably safe place to work. He denies plaintiff's testimony *in toto*, and that presented an issue of fact for the jury to determine. The jury has a right to pass upon an issue of fact involving an alleged vice-principalship as much as they have on any other issue of fact presented by the testimony in any case.

I repeat, the question is very close and there was barely enough evidence on the question of vice-principalship to induce me to submit it to the jury. I am not sure I was right in the ruling but I believe that I was and will leave it to a higher Court to decide whether or not I was wrong. On this question of leaving all facts to the jury I wish to cite the following recent cases in Federal Courts in which it was held upon widely varying issues in different cases that questions of fact are for the jury to determine: *Myers vs. Pittsburgh Coal Co.*, 233 U. S. 184; *Tex. & Pac. R. Co. vs. Prater*, 229 U. S. 177; *C. R. I. & P. R. Co. vs.*

Brown, 229 U. S. 317; Tex. & Pac. R. Co. vs. Harvey, 228 U. S. 319; Brewery Co. vs. Schmidt, 226 U. S. 162; Davis vs. Scroggins, 284 F. 760; Dahlen vs. Hines, 275 F. 817; Gunn vs. Standard Oil, 275 F. 932; St. L. R. Co. vs. Jefferys, [164] 276 F. 73; Woodward vs. Limbaugh, 276 F. 1; Gover vs. A. P. A., 278 F. 927 (this was an Alaska case in the Ninth Circuit); Davis vs. Reynolds, 280 F. 363; Watson Coal & M. Co. vs. Greeson, 284 F. 510; Atlantic Coast Line R. Co. vs. Williams, 284 F. 262; Collins vs. Barner, 268 F. 699 (a case of a badly loaded elevator); Patton vs. Kenmont Coal Co., 268 F. 334; Dunton vs. Hines, 267 F. 452; Southern R. Co. vs. Miller, 267 F. 376; Gibson vs. Germat, 267 F. 305; McMillan vs. Alaska Fish Co., 266 F. 26 (another Alaska case in the Ninth Circuit).

In *Beatson Copper Co. vs. Pedrin*, 217 F. 43, the Circuit Court of Appeals for the Ninth Circuit held in effect that the question of vice-principalship was one for the jury. In that case Pedrin and another miner had been ordered into the glory hole immediately after the firing of a shot in a wall. One of the men protested that the wall should be examined first, but the shift boss assured them that it was safe and ordered them immediately to work in the glory hole. A slide came shortly afterwards and Pedrin was badly injured. It was urged by the defendant corporation in that case as in this, that the shift boss was a fellow-servant of Pedrin. The appellate court did not directly rule on this point but held the evidence sufficient to support

the judgment. In concluding the opinion, Judge Ross said: "The evidence we think was such as to make the case a proper one for the submission to the jury under appropriate instructions."

The case of *Stewart vs. Newby*, 266 F. 287, is cited by counsel for defendant. This case was reversed in the Fourth Circuit for errors in the admission of testimony and in the instructions, but in the opinion the Court said, discussing [165] the principles by which it can be determined whether one is a vice-principal or fellow-servant, "It is certain now that the test is duty and not rank, and is determined by obligation rather than authority." The Court further said, in discussing the nondelegable duty of the master to furnish servants with a reasonably safe place to work, "What constitutes due care or negligence in any particular case is ordinarily a question of fact for the jury."

The other questions raised by the motion for a new trial will be discussed briefly. I think the complaint stated a cause of action and that the plaintiff's testimony corresponded sufficiently to the allegations.

I do not think any error was committed in admitting the X-ray photograph. All that is required in such cases is that the photograph be sufficiently identified. Plaintiff testified he saw the photograph after it was taken and he was sure the plate was the same. His credibility on that point was for the jury. In the use of the plate a clear distinction was made between what the plate

showed and Dr. Bulkley's testimony as to what he had himself found upon an examination of the plaintiff. In the latter he made no use of the plate.

Defendant criticises the second paragraph in the Court's instructions, No. 5, saying "That the Court assumes that if Frederickson had any authority to direct the plaintiff as to the manner in which the plaintiff performed his work then Frederickson was a vice-principal of defendant." It is difficult to read that meaning from this instruction. The instruction is that plaintiff's right to recover was dependent upon his showing that he was subject to Frederickson's orders and that Frederickson was responsible for the way the wagon was loaded, including the quantity of said load. The whole must be read together and the meaning is plain that if he was subject [166] to Frederickson's orders in the matter of loading the wagon then the corporation would be liable if Frederickson was guilty of negligence which places plaintiff in an unnecessarily dangerous position. All this is made plain by the other instructions, and Courts have decided so often that instructions must be taken as a whole and that if one instruction is obscure but is explained by others there is no error, it seems hardly necessary to argue this matter any further.

Instruction No. 6 is criticised but I see no error in it and none that impresses me is suggested by counsel's argument.



Paragraph 1 of instruction No. 7 is criticised because it is claimed that the following statement,

“Plaintiff is entitled to recover if he has proven by a fair preponderance of the evidence that his injury was the result of an unusual risk which he assumed under the direct orders of an officer of the defendant corporation”

is an instruction in effect that if Frederickson had authority to give the plaintiff any instructions whatever as to the manner in which he performed his work then Frederickson was a vice-principal. It is difficult to see how counsel arrives at the conclusion that an instruction that if the injury was the result of an unusual risk assumed under the direct orders of a vice-principal plaintiff is entitled to recover, is a statement that if Frederickson had authority to give the plaintiff any instructions whatever that made Frederickson a vice-principal.

I am unable to see any force in the other exceptions to the instructions, and the grounds for refusing some of the instructions asked by defendant are sufficiently stated in the memorandum written upon those requested instructions at the time.

The motion for a new trial is, therefore, denied.

Dated at Valdez, Alaska, June 6, 1923.

E. E. RITCHIE,

District Judge.



Filed in the District Court, Territory of Alaska,  
Third Division. Jun. 7, 1923. W. N. Cuddy,  
Clerk. By ———, Deputy. [167]

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In the District Court for the Territory of Alaska,  
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

### **Judgment.**

This action having been brought on regularly for trial on the 20th and 21st days of February, 1923; the said parties theretofore appearing by their attorneys; a jury of twelve persons having been regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the court, the jury retired to consider their verdict, and subsequently on the 22d day of February, 1923, returned into court and being called, answered to their names and say they find a verdict for the plaintiff in the sum of \$2250. A motion for a new trial having been interposed by defendant and filed herein within the time prescribed therefor by law,

the same was argued before the court on the 27th day of February, 1923, and the Court took the same under advisement, and on the 6th day of June, 1923, did deny said motion for a new trial.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is considered and adjudged and ordered that said plaintiff have and recover from said defendant the amount allowed him by the verdict of the jury as aforesaid, to wit, the sum of Two Thousand Two Hundred Fifty Dollars (\$2,250.00), with interest thereon at the rate of eight per centum per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action amounting to the sum of \$——.

Judgment rendered the 21st day of June, 1923.

E. E. RITCHIE,

Judge.

Filed in the District Court, Territory of Alaska, Third Division. June 21, 1923. W. N. Cuddy, Clerk. By S. N. Scott, Deputy.

Entered Court Journal No. 13, page No. 875.

[168]

February 1, 1923, Term of Court, Valdez, Alaska,  
June 21, 1923—41st Court Day.

In the District Court for the Territory of Alaska,  
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

**Minutes of Court—June 21, 1923—Order Extend-  
ing Time Sixty Days to Settle Bill of Excep-  
tions.**

On motion of Messrs. Donohoe & Dimond, at-  
torneys for defendant, it is

ORDERED that defendant have sixty days  
within which to prepare, file and settle bill of ex-  
ceptions on writ of error.

IT IS FURTHER ORDERED that the super-  
sedeas and cost bond on writ of error be fixed at  
Three Thousand and No/100 Dollars (\$3,000.00).  
[169]

In the District Court for the Territory of Alaska,  
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

**Order Amending Minute Order.**

Upon the application of the Blum-O'Neill Company, defendant above named, and good cause appearing therefor, it is

ORDERED that the minute order heretofore entered by the Court on February 21st, 1923, permitting the defendant to file its second amended answer be and the same is hereby amended so as to read as follows:

“On stipulation between counsel for the plaintiff and the defendant in open court, it is

ORDERED that the defendant may file its second amended answer in this cause, and that the reply of the plaintiff to defendant's first amended answer heretofore filed may stand as plaintiff's reply to defendant's second amended answer.”

This being the stipulation made by the parties in open court at the time.

This order is made this 30th day of July, 1923,  
*nunc pro tunc* as of February 21st, 1923.

E. E. RITCHIE,  
District Judge.

Filed in the District Court, Territory of Alaska,  
Third Division. Jul. 30, 1923. W. N. Cuddy,  
Clerk. By S. N. Scott, Deputy.

Entered Court Journal No. 13, page No. 895.  
[170]

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In the District Court for the Territory of Alaska,  
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

**Order Settling and Certifying Bill of Exceptions.**

This cause having come on regularly for hearing on motion of the defendant, the Blum-O'Neill Company, for an order settling and certifying its bill of exceptions to be used upon its writ of error about to be prosecuted in said cause to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment of the above-named Court made and entered herein on the 21st day of June, 1923, in favor of the plaintiff and against the defendant,



the Blum-O'Neill Company, a corporation, as in said judgment set forth; and it appearing that said defendant has submitted to the court its proposed bill of exceptions, and served a copy of the same upon counsel for plaintiff, and that the court made herein an order fixing the time for the settlement and filing of said bill of exceptions at the hour of ten o'clock in the forenoon on this tenth day of July, 1923, and forthwith gave due notice of the time and place for the settlement and filing of said bill of exceptions to the counsel for plaintiff; and no amendments or objections to said bill of exceptions having been made by said plaintiff, and the undersigned Judge of said District Court, being the same judge who presided at the trial of said cause and who made the order entering said [171] judgment, having inspected and considered said bill of exceptions and found the same to contain all of the papers, pleadings, proceedings, exceptions and original exhibits necessary to a determination of the questions involved and raised by defendant's (The Blum-O'Neill Company) exceptions,—

IT IS THEREFORE ORDERED, that the foregoing bill of exceptions be and the same is hereby allowed, approved and settled and that the same shall be and constitute defendant's (The Blum-O'Neill Company) bill of exceptions upon the prosecution of its writ of error in said cause.

AND IT IS FURTHER ORDERED, that this order shall be deemed and taken as a certificate of the undersigned Judge of this Court that such bill of exceptions consists of all the papers, pleadings,

proceedings and exceptions filed, presented, had, done, and taken in said cause, with all the original exhibits essential to the determination of said cause, and all of the matters considered by said Court in making and entering said judgment of June 21, 1923, in favor of said plaintiff and against said defendant, The Blum-O'Neill Company, as in said judgment specifically set forth, and of all of the matters and things necessary or proper for the determination of the questions involved herein, or raised or attempted to be raised, by the exceptions taken by said defendant at the trial of said cause, and in the proceedings had in connection with such judgment.

Done at Valdez, Alaska, this 30th day of July, 1923.

E. E. RITCHIE,  
District Judge.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 30, 1923. W. N. Cuddy, Clerk. By S. N. Scott, Deputy.

Entered Court Journal No. 13, page No. 896.  
[172]

In the District Court for the Territory of Alaska,  
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

**Petition for Writ of Error.**

Comes now the defendant as plaintiff in error herein and says:

That on the 21st day of June, 1923, the above-named Court in the above-entitled cause made and entered its judgment in favor of the above-named plaintiff, defendant in error, against the above-named plaintiff in error.

That in said judgment, and in the proceedings had prior thereto, certain errors were committed to the prejudice of the said defendant, and plaintiff in error, The Blum-O'Neill Company, all of which more fully appears in the assignment of errors filed with this petition.

WHEREFORE, the said defendant and plaintiff in error prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, and that a transcript of the record, testimony, proceedings and papers in this cause, duly authenticated, may be sent to the

United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may be proper.

DONOHOE & DIMOND,

Attorneys for Defendant and Plaintiff in Error.

Due service of the foregoing petition for writ of error admitted this 17th day of August, 1923,

FRANK H. FOSTER and

L. V. RAY,

Attorneys for Plaintiff and Defendant in Error.

Filed in the District Court, Territory of Alaska, Third Division. Aug. 18, 1923. W. N. Cuddy, Clerk. By ———, Deputy. [173]

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In the District Court for the Territory of Alaska,  
Third Division.

No. C—246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

**Assignment of Errors.**

Comes now the defendant, The Blum-O'Neill Company, the plaintiff in error in the above-entitled action, and makes and files the following assignment of errors upon which said plaintiff in error

will rely in its prosecution of the writ of error herein.

I.

The Court erred in admitting in evidence, over the objection and exception of the defendant, Plaintiff's Exhibit "A," the same being an X-ray plate or picture, and plaintiff's evidence relating thereto. Such evidence, and the order of the Court admitting said exhibit in evidence, and the defendant's objections and exceptions thereto as shown by the bill of exceptions herein, being as follows:

Direct Examination of Mr. SULLIVAN by Mr.  
FOSTER.

"Q. Did you have an X-ray picture taken of this leg recently?    A. Yes, sir.

Q. By whom?    A. By Dr. Beeson.

Q. Where?    A. Anchorage.

Q. Who took the picture?

A. Dr. Thompson and Dr. Beeson, both together.

[174]

Q. When did this take place?

A. It is about a month ago.

Q. Was it the 12th of January?

A. Yes, I think it was about the 12th or 13th.

Q. And what time of day was this picture taken?

A. It was taken about, I am not sure, I think it was about two o'clock.

Q. And after the picture was taken what did Dr. Thompson do.

A. He developed it right in the room. There is a little dark room there. They developed it there.

Q. While you were present?    A. Yes, sir.



Q. Handing you Plaintiff's Exhibit 'A' for identification, contained in an envelope, I will ask you to look at this plate and state whether or not that is the plate which you have testified to as having been taken and developed by Dr. Thompson in your presence on the twelfth of January?

A. Yes, sir; it is.

Q. What does that show?

Mr. DONOHOE.—It shows for itself.

Mr. FOSTER.—Well, we offer it in evidence and ask it be marked Plaintiff's Exhibit 'A.'

Mr. DONOHOE.—We object to its introduction in evidence on the ground that it is not proved to be a picture taken by an operator of an X-ray machine, and has not been properly identified.

The COURT.—I understand he says he saw it taken and developed.

Mr. FOSTER.—Has this been in your possession ever since?

A. It has been in Dr. Beeson's possession. He sent it by registered mail over here.

Mr. DONOHOE.—We renew the objection on the ground that [175] he has not had possession of the picture all the time.

Mr. FOSTER.—Is that the original picture taken in Dr. Beeson's office?

A. Yes, sir; it is. Every break in the leg is shown in that picture. It is easy to see it. A blind man could see it.

The COURT.—Objection overruled. Exception allowed.

The X-ray is admitted in evidence and will be marked Plaintiff's Exhibit 'A.' "

## II.

The Court erred in admitting in evidence, over the objection and exception of the defendant, certain testimony of Dr. J. L. Bulkley, a witness for the defendant, relative to Plaintiff's Exhibit "A," and plaintiff's alleged condition as shown by the said exhibit; such testimony and the objections and exceptions of defendant thereto being as follows, to wit:

Direct Examination of Dr. J. L. BULKLEY by Mr. FOSTER.

"Q. Handing you Plaintiff's Exhibit 'A,' I will ask you to examine that exhibit. From the examination you have made of plaintiff's leg what have you to say as to that film?

Mr. DIMOND.—Object to the question as the witness has not shown himself competent to testify as to the film; and we raise the same objection to this testimony as to the film because Dr. Beeson is not here to testify as to its taking and the testimony is mere hearsay. The witness Sullivan is not competent to identify it.

The COURT.—The latter part of the objection as to the identification of the plate is overruled.

Mr. FOSTER.—They have already admitted he was qualified. [176]

Mr. DIMOND.—I will admit Dr. Bulkley can take X-ray pictures and is generally qualified as a physician.

The COURT.—Very well, you may qualify him.

Mr. FOSTER.—Have you ever taken X-ray pictures. A. I have.

Q. Have you in your practice seen many X-ray pictures?

A. I have seen some X-ray pictures; I do not know whether you would call them many.

Q. Are you familiar with the anatomy of the human form? A. Yes, sir; supposed to be.

Q. From your experience as a physician and surgeon, and from your examination and study of the X-ray, can you take a picture such as you have and from that state the general characteristics of the leg from which it was taken—the condition of the bones? A. I think I can, yes, sir.

Q. You may state what that picture shows to you?

Mr. DIMOND.—Same objection.

The COURT.—Overruled. Exception allowed.

Mr. FOSTER.—Taking into consideration your physical examination of the plaintiff?

A. I believe this X-ray negative to be a picture of the leg that I examined.

Mr. DIMOND.—We move that the answer be stricken. We will admit his general qualifications, but he has not shown his qualifications to testify as to this particular picture.

The COURT.—I am not certain about his knowledge, but it has been testified by Mr. Sullivan it is the plate taken by Dr. Beeson of his leg.

Mr. FOSTER.—It has been admitted in evidence as the picture of Sullivan's leg which was taken.

The COURT.—Mr. Sullivan testified that he was present when this was taken; that the plate was developed by Dr. Beeson and he mailed it over here himself. Dr. Bulkley here testified he has examined Mr. Sullivan's leg. I don't think he should testify as to what he found from examining Mr. Sullivan's leg in connection with what the plate shows. I think they are separate.

Q. What did you find from that plate. What does that show as to the condition of the leg?

Mr. DIMOND.—We object to the question. If he made the plate he could have testified from it.

The COURT.—The objection is overruled. Exception is allowed.

A. Fracture of both bones.

Q. Recent or somewhat longstanding?

Mr. DIMOND.—Same objection.

The COURT.—The objection is overruled. Exception allowed.

A. I am unable to say. I don't think anybody could say that.

Q. What can you say as to the knitting or condition as shown by that plate of those bones?

Mr. DIMOND.—I wish the record to show that our objection goes to all the testimony of Dr. Bulkley about this plate.

The COURT.—Yes, it is understood all this goes in under objection.

Q. I will ask you this first; From your examination of Sullivan; what do you find as to the present condition of his injured leg, his maimed leg?



A. The leg itself is crooked. The bone is set. While it is set in fair alignment it is not set in perfect alignment. The upper fragment is anterior to the lower fragment. It is forward, shoved down and sort of projects.

The COURT.—Is there anything in the pleadings about improper setting? [178]

The WITNESS.—Why, that is not my attempt. I don't say it was an improper setting. In fact, I think it was set very well.

Mr. DIMOND.—We move to strike all this testimony on the ground that there is no foundation for it in the pleadings. The pleadings show he suffered a compound fracture of the leg and was compelled to pay doctor and hospital bills in the amount of \$418; that he has suffered loss of wages in the sum of \$150 a month; that he will be crippled for a year from the date of his injury and has suffered pain and anguish. There is nothing about any malformation of the leg.

Mr. RAY.—It is alleged in the prayer for damages that the crippled condition will probably continue for a year, and the doctor is asked to describe the condition which he finds at this time. It is merely preliminary to further questions as to the time of recovery from the accident of the crippled condition, and the time before the leg will be entirely well. It leads up to the testimony which goes to cover that particular element of damage.

The COURT.—The motion is denied. The jury will be specially instructed about that. Exception allowed.



Q. From an examination you have made of the plaintiff in this action would you say he is not at this time able to do manual labor?

A. In my opinion he is not.

Q. In your opinion how long, approximately, will it be before he can do the work of a laboring man, the ordinary common laborer. I am not asking you exactly.

A. I think from the condition of his leg that I would not expect him to do heavy manual labor for six months.

The COURT.—From this time? A. Yes.”  
[179]

### III.

The Court erred in denying defendant's motion for a nonsuit in favor of defendant and against plaintiff made at the close of plaintiff's testimony, such motion and the order of the Court denying same, as shown by the bill of exceptions, being as follows, to wit:

“Mr. DONOHOE.—Comes now the above-named defendant and moves this Court for an order granting a nonsuit against the plaintiff and dismissing the case on the following grounds:

1. The complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant in this, that the plaintiff in his complaint has failed to plead facts sufficient, if true, to make Fred Frederickson a vice-principal of said defendant in his actions and conduct in relation to the

accident which caused the injury of which plaintiff complains.

2. That plaintiff has wholly failed by his evidence to prove that the said Fred Frederickson acted as vice-principal in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

3. That it is clearly shown by plaintiff's testimony that if said Fred Frederickson was guilty of any negligence, it was the negligence of a fellow-servant and not of a vice-principal.

4. That upon the evidence introduced by plaintiff, it clearly establishes the fact that plaintiff, by his conduct at and immediately before the time of the accident, assumed the risk which resulted in the accident which caused the injuries complained of.

5. That it is clearly established by the evidence of the plaintiff that the accident which caused the injury complained of was brought about through the sole negligence of plaintiff and, therefore, he is guilty of contributory negligence which bars his recovery against the defendant in this action.

The COURT.—Motion denied. Exception allowed.”

#### IV.

The Court erred in denying defendant's motion for an instructed verdict in favor of defendant and against plaintiff made at the close of the entire case, such motion and the order of the Court denying the

same, as shown by the bill of exceptions, being as follows, to wit:

“Mr. DONOHOE.—We wish to make a motion and desire to argue that motion to some extent. [180]

The defendant now moves this Court to instruct the jury to find a verdict for the defendant and against the plaintiff on the following grounds:

1. The complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant in this, that plaintiff in his said complaint has failed to plead facts sufficient, if true, to make Fred Frederickson a vice-principal of the defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

2. The plaintiff has wholly failed to prove that said Fred Frederickson was a vice-principal of defendant or acted as vice-principal of defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

3. That it is clearly shown by the plaintiff's testimony that if said Fred Frederickson was guilty of any negligence it was the negligence of a fellow-servant and not that of the vice-principal of defendant.

4. The evidence introduced by plaintiff clearly establishes the fact that plaintiff, by his conduct at and immediately before the time

of the accident, assumed the risk which resulted in the accident which caused the injuries complained of.

5. That it is clearly established by the testimony of the plaintiff that the accident which caused the injuries complained of was brought about by the sole negligence of plaintiff and, therefore, he is guilty of contributory negligence which bars his right to recover in this action.

Motion for an instructed verdict was by the Court denied and defendant allowed an exception to the ruling."

V.

The Court erred in giving to the jury, over the exception of the defendant made in the presence of the jury and before they retired, the Court's instruction No. 5, which said instruction, together with defendant's exception thereto duly allowed by the Court as shown by the bill of exceptions, being as follows, to wit:

"Mr. DIMOND.—The defendant excepts to the second paragraph, not numbered, of the Court's instruction No. 5, reading as follows: [181]

'If the jury find from the evidence that Frederickson had no authority to direct the plaintiff as to the manner in which he performed his work, then he was not a vice-principal but he and the plaintiff were fellow-servants and plaintiff cannot recover even though you should find that his injury was due in whole or in part to some negligent action of Frederickson. His



right to recover in this action is dependent upon his showing by fair preponderance of the evidence that he was subject to Frederickson's orders, and that Frederickson was responsible for the way in which the wagon was loaded, including the quantity of the load.'

This exception is based on the defendant's theory of the case that Frederickson had no authority to act for the principal as to any nondelegable duties of the defendant and did not so act. And the evidence shows that any directions Frederickson may have given plaintiff were given as an operative concerning the details of the work.

Exception allowed."

## VI.

The Court erred in giving to the jury, over the exception of the defendant made in the presence of the jury and before they retired, the Court's instruction No. 6, which said instruction, together with the defendant's exception thereto duly allowed by the Court as shown by the bill of exceptions, being as follows, to wit:

"Mr. DIMOND.—The defendant excepts to the Court's instruction No. 6 in its entirety as given by the Court on the ground, as stated in the exception to the former instruction, and that it assumes the defendant is bound by all orders of Frederickson where, as the defendant views the law, Frederickson in giving such orders was not performing any of the nondelegable duties of the defendant. That instruction reads as follows:



‘You are instructed that it is not sufficient to entitle the plaintiff to recover in this case to show a negligent breach [182] of duty on the part of defendant corporation or its responsible agent, but it devolves upon the plaintiff to show further that such breach of duty was the proximate or immediate cause of his injury. If the plaintiff in any important degree or way contributed to the accident he was guilty of what is known in law as contributory negligence. In such case the law disregards the negligence of the defendant and makes the negligence of the plaintiff a bar to his recovery. You have already been instructed that a servant entering into employment assumes all the natural risks and hazards of the work. In this case if you find that the accident was due to any unusual conditions you are to determine from all the evidence in the case whether or not plaintiff was so bound by the orders given him by Frederickson, if orders were given him, that he could not without disobeying orders so shape his conduct as to avoid the unusual risk. If he could have so acted in the emergency by the exercise of reasonable prudence and foresight such as may be expected of an ordinary man in a like situation, and failed to do so, he was guilty of contributory negligence and is not entitled to recover.’

Exception allowed.”

## VII.

The Court erred in giving to the jury, over the

exception of the defendant made in the presence of the jury and before they retired, paragraph one (1) of the Court's instruction No. 7, which said instruction, together with the defendant's exception thereto duly allowed by the Court, as shown by the bill of exceptions, being as follows, to wit:

“Mr. DIMOND.—The defendant excepts to the first paragraph, No. 1 of the Court's instructions No. 7;

‘1. That plaintiff is entitled to recover if he has proven by a fair preponderance of the evidence that his injury was the result of an unusual risk which he assumed under the direct orders of a vice-principal of the defendant corporation, and that he was guilty of no contributory negligence which aided materially in producing the accident, that is, under the circumstances he acted as might be expected of an ordinary prudent and careful man in his situation.’

upon the ground last-above stated, and that it assumes the plaintiff was bound to follow the orders of Frederickson and that his injury so resulting might be used as a basis of plaintiff's negligence against the defendant. Exception allowed.” [183]

#### VIII.

The Court erred in giving to the jury, over the exception of the defendant made in the presence of the jury and before they retired, paragraph two b (2b) of the Court's instruction No. 7, which said instruction, together with the defendant's excep-

tion thereto duly allowed by the Court, as shown by the bill of exceptions, being as follows, to wit:

“The defendant also excepts to the Court’s instructions subparagraph 2 (b) of the Court’s instruction No. 7, reading as follows:

‘That plaintiff is not entitled to recover if you find \* \* \* (b) If he was injured through the act of a fellow-servant, that is the act of an employee who had no controlling authority over him in the circumstances.’

Exception allowed.”

### IX.

The Court erred in giving to the jury, over the exception of the defendant made in the presence of the jury and before they retired, the Court’s instruction No. 8, which said instruction, together with the defendant’s exception thereto duly allowed by the Court, as shown by the bill of exceptions, being as follows, to wit:

“Mr. DIMOND.—Defendant further excepts to the Court’s instruction No. 8 in its entirety upon the ground that there is no substantial basis for it in the evidence, the instruction reading as follows:

‘If you find that plaintiff is entitled to recover you will include in the amount of his recovery whatever reasonable sums he has paid for medical and hospital treatment; second, such sum as will compensate him for his loss of time from work; third, such sum as the jury may find he is entitled to receive for the mental and physical pain and suffering he has undergone as the result of his said in-

jury. This latter sum is difficult of exact computation since pain and suffering can not be [184] measured in money. The amount allowed is left to the sound discretion of the jury. The total amount must not exceed the amount asked in plaintiff's complaint, to wit, \$6358.'

Exception allowed."

X.

The Court erred in refusing to give defendant's requested instruction No. 2, which said instruction, together with the defendant's exception to the Court's refusal to give the same made in the presence of the jury and before the jury retired, as shown by the bill of exceptions, is as follows, to wit:

"Mr. DIMOND.—The defendant further excepts to the Court's refusal to give its requested instruction No. 2, reading as follows:

'You are instructed that the plaintiff's own testimony shows that he remained on the wagon to which he has testified at the time when the wagon was being loaded by the defendant's employee, Fred Frederickson, and when he had ample opportunity to remove himself to a place of safety. By so doing the plaintiff knowing, as he had pleaded, the condition of the streets of the town of Cordova, and particularly the condition of the streets in said town, assumed all of the risks incident to his remaining on said wagon and attempting



to drive with it down said B Street, and the defendant is not liable for the injuries plaintiff thus suffered.'

Exception allowed."

#### XI.

The Court erred in refusing to give defendant's requested instruction No. 4, which said instruction, together with the defendant's exception to the Court's refusal to give the same made in the presence of the jury and before the jury retired, as shown by the bill of exceptions, is as follows, to wit:

"Mr. DIMOND.—The defendant excepts to the refusal of the Court to give its requested instruction No. 4, reading as follows, to wit:

'I instruct you that a servant assumes the ordinary risks of his employment and is bound to exercise his own skill and diligence to protect himself, and unless you find from the evidence that the plaintiff exercised due skill and diligence to protect himself in choosing the route down B Avenue over the snow and ice in preference to the route of B Avenue to Second Street then you must find for the defendant.'

Exception allowed." [185]

#### XII.

The Court erred in denying defendant's motion for a new trial, to which order and ruling of the Court the defendant then and there duly excepted and the exception was allowed.



XIII.

The Court erred in entering judgment in favor of the plaintiff and against the defendant.

WHEREFORE, defendant, The Blum-O'Neill Company, prays that the said judgment of the district court of the Territory of Alaska, third division, may be reversed, set aside and held for naught.

DONOHUE & DIMOND,  
Attorneys for Defendant, and Plaintiff in Error,  
The Blum-O'Neill Company.

Filed in the District Court, Territory of Alaska,  
Third Division. Aug. 18, 1923. W. N. Cuddy  
Clerk. By S. N. Scott, Deputy. [186]

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In the District Court for the Territory of Alaska,  
Third Division.

No. C-246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

**Order Allowing Writ of Error.**

On this 18th day of August, 1923, came the above-named defendant and plaintiff in error herein by its attorneys and filed and presented to the Court its petition praying for the allowance of a writ of

error, and the assignments of error intended to be urged by it; praying also that a transcript of the record, testimony, proceedings and papers upon which the order and judgment herein was rendered, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit and that such other and further proceedings may be had as may be proper in the premises.

NOW, THEREFORE, in consideration of the premises, and the Court being fully advised, it is

ORDERED that the aforesaid writ of error be, and the same hereby is, allowed upon the said defendant giving a bond according to law in the sum of Three Thousand Dollars (\$3,000.00), which shall operate as a supersedeas. It is further

ORDERED that a transcript of the record, testimony, papers, files and proceedings, and the plaintiff's original exhibits admitted in evidence at the trial of said cause, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Done by the Court at Valdez, Alaska, August 18, 1923.

E. E. RITCHIE,  
District Judge.

Filed in the District Court, Territory of Alaska, Third Division. Aug. 18, 1923. W. N. Cuddy, Clerk. By S. N. Scott, Deputy.

Entered Court Journal No. 13, page No. 908.  
[187]

In the District Court for the Territory of Alaska,  
Third Division.

No. C-246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

**Supersedeas and Cost Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS,  
That we, The Blum-O'Neill Company, a corpora-  
tion, organized and existing under the laws of  
the Territory of Alaska, and having its usual and  
principal place of business at Cordova, in said Ter-  
ritory, as principal, and National Surety Company,  
a corporation, organized under the laws of the State  
of New York, and authorized to do business as a  
surety in the Territory of Alaska, as surety, are  
held and firmly bound unto F. J. Sullivan, plain-  
tiff above-named, in the sum of Three Thousand  
Dollars (\$3,000.00) to be paid to the said F. J.  
Sullivan, his heirs, executors, administrators or  
assigns, to which payment well and truly to be  
made we bind ourselves, our heirs, executors and  
administrators, jointly and severally, by these  
presents.

Sealed with our seals, and dated this 15th day  
of August, 1923.

WHEREAS, the above-named defendant, The Blum-O'Neill Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered against it in the above-entitled action by the District Court for the territory of Alaska, Third Division, which judgment was so rendered and entered by said Court on the 21st day of June, 1923, for the sum of Two Thousand Two Hundred Fifty (\$2,250.00) and costs; and for the return of certain property. [188]

NOW, THEREFORE, the condition of the above obligation is such that if the above-named The Blum-O'Neill Company, a corporation, shall prosecute said writ to effect, and shall answer all costs and damages, if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the principals named herein have hereunto set their hands, and the surety named herein has hereunto set its hand and affixed its corporate seal, this 15th day of August, A. D. 1923.

THE BLUM-O'NEILL COMPANY.

Per M. BLUM, President,  
Principal.

NATIONAL SURETY COMPANY.

[Seal] By GEO. J. LOVE,  
Its Agent and Attorney in Fact,  
Surety.

Attest: J. L. REED,  
Attorney in Fact for National Surety Company.

Filed in the District Court, Territory of Alaska, Third Division. Aug. 18, 1923. W. N. Cuddy, Clerk. By S. N. Scott, Deputy. [189]

United States of America,  
Territory of Alaska,—ss

George J. Love, being first duly sworn, upon his oath says: I am the duly appointed and authorized agent of the National Surety Company, a corporation, the surety named in and which caused to be executed the foregoing supersedeas and cost bond on writ of error. That in conjunction with J. L. Reed, of Valdez, Alaska, I executed said undertaking for and on behalf of said corporation, under due and full authority so to do.

That said corporation is a corporation organized and existing under the laws of the State of New York, and is duly qualified, authorized and empowered to do and transact business as a surety in the Territory of Alaska, and to execute and become surety upon the foregoing undertaking; and, to the best of my knowledge and belief, it has fully complied with the provisions of Chapter 52 of the Session Laws of Alaska of the year 1915, approved April 29, 1915, and entitled:

“An act relative to bail, recognizance, stipulations, bonds and undertakings, and to allow certain corporations to become surety thereof, and for other purposes,”

and that said corporation has fully complied with all other laws of the United States and of the Territory of Alaska.

GEO. J. LOVE.



Subscribed and sworn to before me this 15th day of August, 1923.

[Notarial Seal]      ANTHONY J. DIMOND,  
Notary Public for Alaska.

My commission expires Feb. 14, 1925.

Receipt of copy of foregoing bond acknowledged July —, 1923.

FRANK H. FOSTER,  
One of Attorneys for Plaintiff. [190]

The above and foregoing bond approved this 18th day of August, 1923, and ordered filed, and that the same operate as a supersedeas.

E. E. RITCHIE,  
District Judge. [191]

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In the District Court for the Territory of Alaska,  
Third Division.

No. C-246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

**Writ of Error.**

The United States of America,  
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable E. E. RITCHIE, Judge of the District Court for the Territory of Alaska, Third Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court before you, or some of you, between F. J. Sullivan, plaintiff, and The Blum-O'Neill Company, a corporation, defendant, manifest error hath happened to the great damage of said defendant, The Blum-O'Neill Company, as is stated in its petition herein. We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in said circuit, within thirty days from the date of this writ, in the said Circuit [192] Court of Appeals, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that

error, what of right and according to the laws and customs of the United States and the Territory of Alaska should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 18th day of August, A. D. 1923, and in the one hundred and forty-eighth year of the Independence of the United States of America.

Allowed by:

E. E. RITCHIE,  
Judge of the District Court for the Territory of  
Alaska, Third Division.

[Seal]                      Attest: W. N. CUDDY,  
Clerk of the District Court for the Territory of  
Alaska, Third Division.

Due service of the within writ of error by receipt of a copy thereof is hereby acknowledged this 18th day of August, 1923.

FRANK H. FOSTER and  
L. V. RAY,  
Attorneys for Plaintiff and Defendant in Error.

Filed in the District Court, Territory of Alaska,  
Third Division. Aug. 18, 1923. W. N. Cuddy,  
Clerk. By S. N. Scott, Deputy.

Entered Court Journal No. 13, page No. 909.  
[193]

In the District Court of the Territory of Alaska,  
Third Division.

No. C-246.

F. J. SULLIVAN,

Plaintiff,

vs

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

**Citation on Writ of Error.**

The United States of America to F. J. Sullivan:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within 30 days from the date of this writing, pursuant to a writ of error in the clerk's office of the District Court for the Territory of Alaska, Third Division, wherein The Blum-O'Neill Company, a corporation, is plaintiff in error and F. J. Sullivan is defendant in error, and show cause, if any there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 18th day of August, in the year of our Lord one thousand nine hundred

and twenty-three, and of the Independence of the United States the one hundred and forty-eighth.

E. E. RITCHIE,

District Judge, Territory of Alaska, Third Division.

Service above citation by receipt of a certified copy thereof admitted at Cordova, Alaska, this 18th day of August, 1923.

FRANK H. FOSTER,

One of Attorneys for Defendant in Error.

Filed in the District Court, Territory of Alaska, Third Division. Aug. 18, 1923. W. N. Cuddy, Clerk. By S. N. Scott, Deputy.

Entered Court Journal No. 13, page No. 909.  
[194]

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In the District Court for the Territory of Alaska,  
Third Division.

No. C-246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corporation,

Defendant.

**Praeceptum for Transcript of Record.**

To the Clerk of the Above-named Court:

You will please make, certify and transmit forthwith to the United States Circuit Court of Appeals



for the Ninth Circuit, at San Francisco, California, a true copy of the record, opinion or opinions of the Court, bill of exceptions, assignment of errors, and all proceedings in the above-entitled cause, under your hand and the seal of said District Court, as a return to the writ of error heretofore sued out of said Circuit Court of Appeals to review the judgment rendered in said cause by said District Court on June 21, 1923, the same to include the following files, records and proceedings in said cause, to wit:

1. Bill of exceptions as allowed and settled by said District Court and containing:
  - a. Plaintiff's complaint.
  - b. Defendant's second amended answer.
  - c. Minute order of February 21, 1923, permitting second amended answer to be filed.
  - d. Plaintiff's reply.
  - e. Transcript of testimony and of the proceedings had upon the trial of said action.
  - f. Plaintiff's Exhibits "A" and "B" (Originals).
  - g. Defendant's Exhibit No. 1.
  - h. Verdict. [195]
  - i. Motion for new trial.
  - j. Minute order denying motion for new trial.
  - k. Opinion of Court on motion for new trial.
  - l. Judgment.
  - m. Order amending *nunc pro tunc* of as February 21, 1923, the minute order of the Court of that date permitting defendant to file second amended answer, and providing that plaintiff's reply theretofore filed should

stand as reply to such second amended answer.

- n. Order granting defendant sixty days from date of judgment to prepare, settle and file bill of exceptions, on writ of error, and fixing supersedeas and cost bond at \$3,000.
- o. Order settling and certifying bill of exceptions.
  - 2. Petition for writ of error.
  - 3. Assignment of errors.
  - 4. Order allowing writ of error.
  - 5. Writ of error (Original).
  - 6. Supersedeas and cost bond on writ of error.
  - 7. Citation on writ of error (Original).
  - 8. This praecipe.

DONOHUE & DIMOND,

Attorneys for Defendant and Plaintiff in Error.

Filed in the District Court, Territory of Alaska,  
Third Division. Aug. 18, 1923. W. N. Cuddy,  
Clerk. By ———, Deputy. [196]

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In the District Court for the Territory of Alaska,  
Third Division.

No. C-246.

F. J. SULLIVAN,

Plaintiff,

vs.

THE BLUM-O'NEILL COMPANY, a Corpora-  
tion,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
Territory of Alaska,  
Third Division,—ss.

I, W. N. Cuddy, Clerk of the District Court, Territory of Alaska, Third Division, DO HEREBY CERTIFY that the above and foregoing and hereto annexed 196 pages, numbered from 1 to 196, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office, including Plaintiff's Original Exhibits "A" and "B"; that this transcript is made in accordance with the praecipe filed in my office on the 18th day of August, A. D. 1923.

I FURTHER CERTIFY that the foregoing transcript has been prepared, examined and certified to by me, and that the costs thereof, amounting to \$32.65 has been paid to me by Anthony J. Dimond, Esq., one of the attorneys for the defendant and appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this 22d day of August, A. D. 1923.

[Seal]

W. N. CUDDY,  
Clerk.

[Endorsed]: No. 4095. United States Circuit Court of Appeals for the Ninth Circuit. The Blum-O'Neill Company, a Corporation, Plaintiff in Error, vs. F. J. Sullivan, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed September 7, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

In the  
**United States Circuit Court  
of Appeals**  
For the Ninth Circuit

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THE BLUM-O'NEILL COMPANY, a Corporation,  
*Plaintiff in Error*

*vs.*

F. J. SULLIVAN, *Defendant in Error*

---

Upon Writ of Error to the United States District Court  
of the Territory of Alaska, Third Division

**Brief of Plaintiff in Error**

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DONOHUE & DIMOND

CORDOVA, ALASKA

AND

LYONS & ORTON

920 ALASKA BUILDING, SEATTLE, WASHINGTON

*Attorneys for Plaintiff in Error*

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No. 4095

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In the  
**United States Circuit Court**  
**of Appeals**  
For the Ninth Circuit

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THE BLUM-O'NEILL COMPANY, a Corporation,  
*Plaintiff in Error*

*vs.*

F. J. SULLIVAN, *Defendant in Error*

---

Upon Writ of Error to the United States District Court  
of the Territory of Alaska, Third Division

**Brief of Plaintiff in Error**

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STATEMENT OF THE CASE

For the sake of convenience, the parties will be designated in this brief plaintiff and defendant, as they were in the trial court.

This is an action for damages for personal injuries alleged to have been sustained on the 4th day of May, 1922, by plaintiff while employed by and working for defendant. The pleadings and evidence of plaintiff and the undisputed evidence of defendant disclose the following alleged facts:

The defendant is and was at all times mentioned in the complaint a corporation engaged in the mercantile business in Cordova, Alaska. It owned and operated a general merchandise store and warehouse at that place. At its store it conducted a regular retail business and used its warehouse to store goods, wares and merchandise, and occasionally sold goods in larger quantities from its warehouse. (Tr. 92.) During all of said time H. I. O'Neill was its vice president and manager and Fred Frederickson its warehouseman. (Tr. 30, 31, 90.) Frederickson's duties were to check the freight as it was delivered into the warehouse, and to check the groceries and other merchandise as they were delivered on orders from the store and occasional customers; to care for the warehouse and the fires in its furnace so as to keep the proper temperature in the building for the goods, wares and merchandise stored therein; to prepare and put up orders given him to fill. (Tr. 91 and 110.)

The plaintiff was a delivery man for defendant during all the times mentioned in the complaint. As such delivery man it was his duty to deliver goods, wares and merchandise from defendant's store and warehouse to its various customers, and also to deliver goods, wares and merchandise from the warehouse to the store when it became necessary to replenish the stock in the store. (Tr. 92, 94 and 95.) Frederickson had no authority over plaintiff or other employees. (Tr. 93 and 94.) Plaintiff was an experienced delivery man and was familiar with the condition of the streets in Cordova at the time of the accident. (Tr. 43.) He was hired by H. I. O'Neill, vice president and manager of the company. (Tr. 43.)

On the 4th day of May, 1922, plaintiff drove the defendant's horse and delivery wagon to the warehouse for the purpose of conveying a load of groceries from the warehouse to the Carlisle Packing Company at the ocean dock in Cordova. Frederickson assisted plaintiff in loading the wagon. After the wagon was loaded, and plaintiff had driven a short distance from the warehouse, Frederickson called to him to stop, as he (Frederickson) wished to and did, over the protest of plaintiff, put four cases of milk and three cases of butter on the

footboard of the wagon that plaintiff was driving (Tr. 35), and plaintiff placed them on the seat. (Tr. 62.) The horse started to go, and plaintiff grabbed the lines with one hand and put the other hand on the cases of milk; a case of milk slid off and hit the horse and the wagon dropped into a hole or rut in the snow and plaintiff fell off the wagon and the wheels of same ran over his leg, breaking and fracturing it in three places. (Tr. <sup>38</sup>38.)

At the close of plaintiff's case defendant moved for a non-suit, which motion was denied by the court. (Tr. 88, 89.)

After both parties had introduced all of their evidence, the defendant moved the court to instruct the jury to return a verdict for the defendant, which motion the court overruled. (Tr. 140, 141.) The jury returned a verdict in favor of the plaintiff for the sum of \$2,250.00, and judgment on the verdict was thereafter entered.

## SPECIFICATIONS OF ERROR

### I

The court erred in denying defendant's motion, after plaintiff and defendant had introduced all



their evidence in said cause, to instruct the jury to return a verdict for the defendant. (Tr. 140, 141.)

## II

The court erred in giving to the jury the following instruction:

“If the jury find from the evidence that Frederickson had no authority to direct the plaintiff as to the manner in which he performed his work, then he was not a vice-principal, but he and the plaintiff were fellow-servants, and plaintiff cannot recover even though you should find that his injury was due in whole or in part to some negligent action of Frederickson. His right to recovery in this action is dependent upon his showing by fair preponderance of the evidence that he was subject to Frederickson’s orders, and that Frederickson was responsible for the way in which the wagon was loaded, including the quantity of said load.” (Tr. 146.)

## III

The court erred in giving to the jury the following instruction:

“You are instructed that it is not sufficient to entitle the plaintiff to recover in this case to show a negligent breach of duty on the part of defendant corporation or its responsible agent, but it devolves upon the plaintiff to show further that such breach of duty was the proximate or immediate cause of his

injury. If the plaintiff in any important degree or way contributed to the accident he was guilty of what is known in law as contributory negligence. In such case the law disregards the negligence of the defendant and makes the negligence of the plaintiff a bar to his recovery. You have already been instructed that a servant entering into employment assumes all the natural risks and hazards of the work. In this case if you find that the accident was due to any unusual conditions you are to determine from all the evidence in the case whether or not plaintiff was so bound by the orders given him by Frederickson, if orders were given him, that he could not without disobeying orders so shape his conduct as to avoid the unusual risk. If he could have so acted in the emergency by the exercise of reasonable prudence and foresight such as may be expected of an ordinary man in a like situation, and failed to do so, he was guilty of contributory negligence and is not entitled to recover." (Tr. 146, 147.)

#### IV

The court erred in giving to the jury the following instruction:

"1. That plaintiff is entitled to recover if he has proven by a fair preponderance of the evidence that his injury was the result of an unusual risk which he assumed under the direct orders of a vice-principal of the defendant corporation, and that he was guilty of no contributory negligence which aided materially in producing the accident, that is, under

the circumstances he acted as might be expected of an ordinarily prudent and careful man in his situation.

"2. That plaintiff is not entitled to recover if you find: (a) that he was injured through an ordinary risk of the employment which risk he assumed when he entered the employment; (b) if he was injured through the act of a fellow-servant, that is the act of an employee who had no controlling authority over him in the circumstances; (c) if you find that his own negligence was an important contributing factor to the accident." (Tr. 147, 148.)

## V

The court erred in refusing to give the jury the following instruction requested by defendant:

"You are instructed that the plaintiff's own testimony shows that he remained on the wagon to which he has testified at the time when the wagon was being loaded by the defendant's employee, Fred Frederickson, and when he had ample opportunity to remove himself to a place of safety. By so doing the plaintiff knowing, as he has pleaded, the condition of the streets of the town of Cordova, and particularly the condition of B Street in said town, assumed all of the risks incident to his remaining on said wagon and attempting to drive with it down said B Street, and the defendant is not liable for the injuries plaintiff thus suffered." (Tr. 155.)

## ARGUMENT

The court should have granted defendant's motion for an instructed verdict for the following reasons:

1. The complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant, because the plaintiff in his complaint has failed to plead facts sufficient, if true, to show that Fred Frederickson was or acted as a vice-principal of the defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains.

2. The plaintiff has wholly failed to prove that said Frederickson was a vice-principal of defendant, or acted as vice-principal of defendant in his actions and conduct in relation to the accident which caused the injury of which plaintiff complains, but the evidence shows that said Frederickson at the time of said accident and prior thereto was and acted as a fellow servant of plaintiff.

3. The evidence further shows that if said Frederickson was guilty of any negligence, and that such negligence caused plaintiff's injury, it was the neg-



ligence of a fellow-servant and not that of a vice-principal of defendant.

4. The evidence clearly establishes the fact that the plaintiff by his conduct at and immediately before the time of the accident assumed the risk which resulted in and caused the injury complained of.

5. The evidence establishes beyond question the fact that the accident which caused the injuries complained of was brought about by the sole negligence of plaintiff.

We will discuss together the first three reasons assigned why defendant's motion for an instructed verdict should have been granted.

It is admitted that the fellow-servant rule of the common law, as construed and expounded by the Supreme Court of the United States and the other Federal courts, must be followed in determining whether or not plaintiff and Frederickson were fellow-servants in the employ of defendant at the time of the accident which caused plaintiff's injuries. The fellow-servant rule of the common law which had theretofore been announced and adopted by the Supreme Court of the United States was declared to be the law in Alaska governing the rela-



tionship between master and servant, in *Alaska Treadwell Gold Mining Company v. Whelan*, 168 U. S. 86, 18 Sup. Ct. Reporter 40. In that case the court, among other things, said:

“This was an action brought in the district court of the United States for the district of Alaska against a mining corporation by a workman in its employ. The complaint alleged: ‘That on November 23, 1891, and for nearly six months prior thereto this plaintiff was in the employ of said defendant, as a workman in the mine of said defendant, in breaking and preparing rock for the chutes, and doing other work, as ordered by the foreman of said defendant, one Samuel Finley, under whom this plaintiff worked, and from whom he received his orders; that on November 23, 1891, while this plaintiff was yet in the employ of said defendant, he was ordered by the foreman of said defendant company to break rock immediately above and over one of the chutes of the defendant company; that, in compliance with the orders of the foreman of said defendant, and as became his duty so to do, the plaintiff proceeded to his place immediately above and over said chute, and commenced to break said rock, as he had been ordered so to do; and that, while so engaged, and carefully and skillfully and without negligence performing his duties, as aforesaid, and without the knowledge of this plaintiff, and carelessly and negligently the foreman of said defendant drew or caused to be drawn, the gate at the mouth of said chute over which this plaintiff was working,

thereby causing the rock at the head of said chute to be suddenly drawn in, carrying this plaintiff with it, through said chute, a distance of about 30 feet, and completely covering him with great quantities of rock and debris,' thereby greatly injuring him.

"At the trial, the plaintiff, being called as a witness in his own behalf, gave evidence tending to support the allegations in the complaint, and testified that on the night of November 23, 1891, he was sent by Samuel Finley, the boss in the pit, to the top of a chute, there to break rock and pound it fine enough to go through the chute, which connected with the tunnel through which the rock was shot into cars to be taken to the mill; that at the bottom of the chute was a gate, always closed until the chute was filled, and orders given to draw it; that Finley's custom was to come upon the top of the chute, to see if the rock was broken fine enough, and, if it was all right, to tell the men to come down, as he was going to draw; and that at the time in question, after putting the plaintiff and others to work at the chute, he never gave them any notice that he was going to draw. . . . .

"The evidence introduced at the trial, giving it the utmost possible effect in favor of the plaintiff, was insufficient to support a verdict for him, and the defendant's request, made at the close of the whole evidence, to instruct the jury to return a verdict for the defendant, because Finley, whose negligence was the ground of the action, was a fellow servant of the plaintiff, should have been granted.

“Finley was not a vice-principal or representative of the corporation. He was not the general manager of its business, or the superintendent of any department of that business. But he was merely the foreman or boss of the particular gang of men to which the plaintiff belonged. Whether he had or had not authority to engage and discharge the men under him is immaterial. Even if he had such authority, he was none the less a fellow-servant with them, employed in the same department of business, and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery, or in giving orders to the men.

“The case is governed by a series of recent decisions of this court, undistinguishable in their facts from this one: *Railroad Co. v. Keegan*, 160 U. S. 259, 15 Sup. Ct. 269; *Railroad Co. v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848; *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843; *Martin v. Railroad Co.*, 166 U. S. 399, 17 Sup. Ct. 603. See, also, *Wilson v. Merry*, L. R. 1 H. L. Sec. 326.”

The fellow-servant rule, as adopted and applied in Alaska by the supreme court in the *Whelan* case has never been abrogated or modified either by an act of congress or of the local legislature of the Territory of Alaska, as to the character of industry

in which plaintiff and Frederickson were engaged at the time of plaintiff's injury. In the absence of a statute to the contrary, the rule laid down in the Whelan case has never been annulled or modified by the supreme court, but has been consistently followed and approved by that court and all other federal courts in cases involving the question of fellow-servants.

The opinion in the Whelan case has been cited with approval by this court. It has been followed and the doctrine it announces approved in the following cases:

*Gaynon v. Durkee*, 87 Fed. 302 at 304.

*The Miami*, 87 Fed. 757 at 760.

*Grady v. Southern R. R. Co.*, 92 Fed. 491 at 493; (Sixth Circuit, opinion by present Chief Justice Taft).

*Wood v. Potlatch Lumber Co.*, 213 Fed. 591 at 593, (Ninth Circuit).

*Union Pacific R. R. Co. v. Marone*, 246 Fed. 916 at 919, (Eighth Circuit).

*James Stewart & Co. v. Newby*, 266 Fed. 287 at 293, (Fourth Circuit).

*Southern Bell Telephone & Telegraph Co. v. Richardson*, 284 Fed. 124 at 126, (Fifth Circuit).



*Andre v. Winslow Bros. Elevator Co.*, 76 N. W. 86 at 87.

*Texas & Pacific R. R. Co. v. Bourman*, 212 U. S. 536, 29 Sup. Ct. 319 at 320.

In the case last cited, the supreme court, through Mr. Justice Moody, said:

“The presiding judge refused to instruct the jury as requested by the defendant, that the engineer and the section foreman were, respectively, fellow-servants of the plaintiff, and that, if the injury occurred through the negligence of either, the plaintiff was not entitled to recover. We think these instructions should have been given. Both the engineer and the section foreman were fellow-servants of the plaintiff; and, if the plaintiff’s injury was caused by the negligence of either, the law, as it many times has been declared by this court, will not permit a recovery.”

And the court cites numerous authorities, including the Whelan case, to sustain the doctrine announced.

In *Wood v. Potlatch Lumber Co.*, 213 Fed. page 591 Supra, the court said, at page 593:

“But the contention most vigorously pressed by the plaintiff is that the case is not one for the application of the fellow-servant doctrine. It is urged in that behalf that the accident was due to the failure on the part of the master to provide a rea-



sonably safe place to work, a default the responsibility for which the master cannot shift. It is not suggested that the premises were defective or unsafe immediately before or immediately after the accident, or that there was any danger other than from the falling timbers, and it is, of course, conceded that the timbers fell, not by accident, but as the result only of Fennell's willful act. Fennell's intelligence and general competency are not called into question, and the defendant had no reason to anticipate that he would take such a reckless course. Admittedly the timbers could have been carried back in the same manner in which they were brought up, or, for that matter, they could have been safely thrown to the ground at the very place where the accident occurred. If, under such circumstances, the negligence of the servant is chargeable to the master, the cases would indeed be rare where the latter could escape liability."

In *Union Pac. R. Co. v. Marone*, 246 Federal, 916 supra, the court said at page 919:

"Negligence is a breach of duty, and where there is no duty or no breach thereof there is no negligence. The duty of the master is one of provision. The duty of the servant is one of operation, and neither is liable for the negligence of the other. It is the duty of the master to exercise reasonable care to provide a reasonably safe place in which, and reasonably safe machinery or appliances with which, the servants may do the work assigned to them, and for causal negligence in the discharge of

this duty the master is liable and the servants are not. It is the duty of the servants to exercise reasonable care so to use the place, machinery, and appliances furnished, so to conduct the operations intrusted to them, as to protect themselves from risk, danger, and injury, and for a breach of this duty the servants are liable and the master is not. Where the place in which the servant is required to work, or the machinery or appliances with which he is required to work, or the method of doing the work, is made or becomes dangerous and results in injury only because of the negligence of the injured employe, or because of the negligence of his fellow-servants, or because of the concurring negligence of both, the master is not liable, for such negligence is a breach of the duty of operation and not a breach of the duty of provision."

The acts of Frederickson which plaintiff claims caused the accident resulting in his injury were acts of operation and not of provision. Plaintiff testified (Tr. 62) that Frederickson shoved the cases onto the footboard, and he (plaintiff) put them on the seat. It is obvious that the plaintiff and Frederickson were merely co-operators in loading the wagon. It is not claimed that the wagon was unsafe or that the horse was not gentle, or that either was unfitted or inadequate for the purposes for which they were being used by plaintiff.

In *James Stewart & Co. v. Newby*, 266 Fed. 287 supra, the court said, at 293 and 294:

“Prima facie all servants in the common employ of a single master are fellow-servants. So it has generally been held that a gang foreman in charge of a squad of ordinary laborers is a fellow-servant with them, and not a vice-principal of the master.

“As applicable to the facts of the decided cases, the conclusions reached in this respect have generally been correct. In some instances, however, the language employed has been misleading, and there is considerable apparent conflict and occasionally some real conflict in the decisions. In some instances the language employed would indicate that gang foremen are fellow-servants with their subordinates, irrespective of the scope of their duty. In others the issue has been determined upon the basis of the foreman’s right or the absence of his right to employ and discharge. The real test is whether the master has intrusted to such one the limited duty of mere operation on the one hand, or a broader duty involving provision on the other. When one is charged with a non-delegable duty of a master, liability for his negligence thereof exists, if injury is thereby caused to another servant of any rank whatever, superior, equal or inferior. Since, however, all who enter a common employment are *prima facie* fellow-servants, in order to render the master liable specific testimony must be produced to show that the offending servant is

charged with some duty of provision, and not merely the ordinary service of operation.”

This court, in *Consolidated Interstate-Callahan Mining Co. v. Witkowski*, 249 Fed. 833 at 836, said:

“It has come to be the settled rule of law also, of the supreme court, that the test as to whether one servant is a fellow-servant of another is not the particular rank he sustains to that other in the service, but the specific character of the act performed.”

We submit that the complaint in the instant case does not plead or show that Frederickson was a vice-principal of defendant, and under the rule announced in the cases cited, it devolves on the plaintiff to plead and prove that the person whose negligence caused his injuries was, at the time of such injuries, a vice-principal of defendant. Otherwise the law presumes such person was a fellow-servant of plaintiff.

In paragraph II of plaintiff's complaint (Tr. 3 and 4), plaintiff alleges:

“That on the 4th day of May, 1922, and for some time previous to said date, Fred Frederickson was in charge of the warehouse of defendant corporation, and was authorized by defendant to superintend the shipment of all goods from said warehouse



and to exercise authority for and on behalf of defendant corporation over the employees of said defendant corporation working in said warehouse and over those delivering goods from said warehouse."

There is no allegation in the complaint to the effect that Frederickson was authorized or employed by defendant to exercise any authority over plaintiff as to the manner of loading the wagon or as to the size of the load plaintiff should haul on the wagon. Frederickson was authorized by defendant to determine what goods should be taken from the warehouse by the deliveryman, and such determination of Frederickson was based upon orders received from defendant's store or some few customers who obtained goods from the warehouse, but such was the extent of Frederickson's authority over plaintiff. (Tr. 102.)

The complaint does not even inferentially allege that Frederickson was authorized to control plaintiff's judgment in reference to the load that could or should be carried on the wagon.

The evidence shows that the defendant was at all times mentioned in the complaint engaged in the retail mercantile business at Cordova, Alaska. That



it operated a general retail store at that place. That the only purpose of maintaining a warehouse was to store therein goods, wares and merchandise so as to enable it to supply its retail store, as the storage room in the latter was inadequate to supply space for all the goods, wares and merchandise which defendant desired to carry in stock at Cordova. (Tr. 96.) O'Neill was vice-president and general manager of the defendant corporation at all times since its incorporation. (Tr. 90.) Frederickson was warehouseman at and prior to the time of plaintiff's injuries (Tr. 90) and as such warehouseman he merely had charge of the warehouse and the goods, wares and merchandise therein contained. He had no authority over any employee of defendant and was not empowered to hire or discharge them. (Tr. 93 and 94.) The business of the defendant was not so extensive or varied as to require different departments for its successful operation. It had only one manager, Mr. O'Neill, who had entire charge of all its business activities and operations, and kept at all times in close touch with the warehouse. (Tr. 90, 91, 92, 93.)

In *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Reporter 914, the court said:

“And it is only carrying the same principle a little further, and with reasonable application, when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employes under them, vice-principals, representatives of the master, as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. . . . .

“The truth is, the various employes of one of these large corporations are not graded like steps in a staircase, those on each step being as to those on the step below in the relation of masters, and not of fellow-servants, and only those on the same steps fellow-servants, because not subject to any control by one over the other. *Prima facie*, all who enter into the employ of a single master are engaged in a common service, and are fellow-servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow-servants. All enter into the service of the same master, to further his interests in the one enterprise; each knows when entering into that service that there is some risk of injury through the negligence of other employes, and that risk, which he knows exists, he assumes in entering into the employment.”

Plaintiff cannot successfully insist that Frederickson was in charge of any independent department of defendant's business operations. He exercised no discretion whatever in reference to the performance of his duties as warehouseman, but was at all times subject to the orders and directions of the defendant's general manager O'Neill, who had direct supervisory control over the warehouse and the duties of Frederickson as warehouseman. (Tr. 93.) Plaintiff had control of defendant's horse and wagon, which he drove subject to the orders of O'Neill, yet no one would seriously contend that plaintiff was in charge of any independent department of defendant's business.

The Supreme Court of the State of Oregon, in *Mast v. Kern*, 54 Pac. 950, at 951, said:

"On the other hand, the rule, and the one now unquestionably established and supported by the great weight of authority both in this country and in England, is that the liability of the master depends upon the character of the act in the performance of which the injury arises, and not the grade or rank of the negligent employe. If the act is one pertaining to the duty the master owes to his servant, he is responsible for the manner of its performance, without regard to the rank of the

servant or employe to whom it is intrusted; but, if it is one pertaining only to the duty of an operative, the employe performing it is a fellow-servant with his co-laborers, whatever his rank, for whose negligence the master is not liable."

*Northern Pac. R. Co. v. Charless*, 162 U. S. 359, 16 Sup. Ct. Reporter 848.

*Northern Pac. R. Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. Reporter 983.

*Martin v. Atchison T. & S. F. R. Co.*, 166 U. S. 399, 17 Sup. Ct. Reporter 603.

*Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. Reporter 843.

*New England R. R. Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. Reporter 85.

*Beutler, Admr. v. Grand Trunk Junction R. Co.*, 224 U. S. 85, 32 Sup. Ct. Reporter 402.

*Weeks v. Scharer*, 111 Fed. 330.

*Christ v. Wichita Gas Electric P. & P. Co.*, 83 Pac. 199.

*Larsen v. LeDoux*, 81 Pac. 600.

*Hussy v. Cogger*, 20 N. E. 556.

*Ell v. Northern Pac. R. Co.*, 48 N. W. 222.

*Deep Mining & Drainage Co. v. Fitzgerald*, 43 Pac. 210.

*Andre v. Winslow Bros. Elevator Co.*, 76 N. W. 86.



The trial court in its opinion overruling defendant's motion for a new trial (Tr. 181 to 197), at pages 186 and 187 said:

"The Whelan case, the Martin case and the Peterson case, and other similar cases so strongly relied on by counsel, were all decided in the last decade of the nineteenth century, when the supreme court, as then constituted, overruled repeated decisions made by the same court. Many of the federal and state courts made similar decisions in that decade and the one following, using the supreme court decisions as authorities. It is true that none of those cases has been expressly overruled but the supreme court itself in the last decade and a half has made repeated decisions so utterly inconsistent with those cited that the action of the court amounts to overruling the earlier ones. The most decisive case is the one already quoted, that of *Kreigh v. Westinghouse*. The opinion by Mr. Justice Day contains statements which amount to a denial in argument of the position taken by the court in the cited cases."

We submit that the Whelan, Martin and Peterson cases have never been overruled by the Supreme Court of the United States, but have been followed by that court and this court, except in jurisdictions where the fellow-servant rule adopted and applied in those cases has been annulled or modified by statute. This court cited the Whelan case with



approval as late as 1914, in *Wood v. Potlatch Lumber Co.*, 213 Fed. 591 supra, and the Supreme Court of the United States approved and followed the Whelan case in *Texas & A. P. R. Co. v. Bourman*, 212 U. S. 536, 29 Sup. Ct. Reporter 319 (decided in 1914, the same year as that court decided the Kreigh case).

In *Beutler, Admr., v. Grand Trunk Junction R. Co.*, 224 U. S. 85, 32 Sup. Ct. Reporter 402, the Supreme Court of the United States, speaking through Mr. Justice Holmes, said:

“The doctrine as to fellow servants may be, as it has been called, a bad exception to a bad rule, but it is established, and it is not open to courts to do away with it upon their personal notions of what is expedient. So it has been decided that in cases tried in the United States courts we must follow our own understanding of the common law when no settled rule of property intervenes . . . . but whether certain facts do or do not constitute a ground of liability is in its nature a question of law. To leave it uncertain is to leave the law uncertain. If the law is bad, the legislature, not juries, must make a change. We answer the certificate, Yes.”

The United States Circuit Court of Appeals for the fifth circuit, in an opinion rendered in 1922 in *Southern Bell Telephone & Telegraph Co. v. Rich-*

*ardson*, 284 Fed. 124, cited and followed the doctrine laid down in the *Whelan* and other cases.

The supreme court said, in *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U. S. 249, 29 Sup. Ct. 619, the case which the trial court seemed to think annulled or modified the fellow-servant rule laid down in the *Whelan* and other cases:

“The employe is not obliged to examine into the employer’s methods of transacting his business, and he may assume, in the absence of notice to the contrary, that reasonable care will be used in furnishing appliances necessary to carrying on the business. *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 68, 48 L. Ed. 96, 100, 24 Sup. Ct. Rep. 24. But while this duty is imposed upon the master, and he cannot delegate it to another and escape liability on his part, nevertheless, the master is not held responsible for injuries resulting from the place becoming unsafe through the negligence of the workmen in the manner of carrying on the work, where he, the master, has discharged his primary duty of providing a reasonably safe appliance and place for his employes to carry on the work, nor is he obliged to keep the place safe at every moment, so far as such safety depends on the due performance of the work by the servant and his fellow-workmen.”

The court in the *Kreigh* case reversed the judgment of the trial court, because there was evidence

to establish the unsafe character of the place where the plaintiff was required to work, and for that reason the supreme court held the case should have been submitted to the jury, but the court did not question the soundness of the fellow-servant rule laid down in the Whelan and other cases.

In *Olson v. Oregon Coal & Navigation Co.*, 104 Fed. 574, this court, speaking through Judge Ross, at page 576, said:

“It is very clear that upon common-law principles the owner would not be liable for an injury sustained by one of such employes by reason of the negligence of one of his co-employes, whatever his grade in the common employment. In the recent case of *Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, Adv. S. U. S. 85, 44 L. Ed. 181, where the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup Ct. 184, 28 L. Ed. 787, was finally and squarely overruled, the supreme court announces the true rule to be, both upon principle and authority, ‘that the employer is not liable for an injury to one employe occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough to bring the case within the general rule of exemption if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes; or, in other

words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end.' It is true that the present case is to be determined, not by the common law, but by the rules of the maritime law; but that law, as was shown very clearly, we think, by Judge Brown in the case of *The City of Alexandria*, supra, is, in respect to the facts here presented, the same."

*The Westport*, 136 Federal 391.

*The C. S. Holmes*, 220 Fed| 273.

*The Rosalie Mahoney*, 218 Fed. 695.

*Western Fuel v. Garcia*, 260 Fed. 839.

The evidence for the plaintiff and the uncontradicted evidence of the defendant shows conclusively that Frederickson and plaintiff were fellow-servants at the time of the accident, and there was therefore no question of fact to be submitted to the jury.

*Alaska Treadwell Gold Mining Co. v. Whe-*  
*lan*, 168 U. S. 86, 18 Sup Ct. 40, supra;

*Union Pac. R. Co. v. Marone*, 246 Fed. 916.

*James Stewart & Co. v. Newby*, 266 Fed.  
287.

*Baltimore & O. R. Co. v. Baugh*, 149 U. S.  
368, 13 Sup. Ct. 914.

With reference to the fourth reason assigned why defendant's motion for an instructed verdict should



have been granted, we submit the danger from overloading the wagon, which plaintiff claims caused the accident occasioning his injuries, was as apparent to him as it could have been to defendant. Plaintiff was familiar with the condition of the streets of Cordova. He had been in the employ of defendant as deliveryman for many months prior to the 4th of May, 1922. He had driven the same horse and loaded wagon over the same street where the accident occurred on the morning of May 4th, 1922, and almost immediately prior to the accident. He was an experienced horseman and deliveryman. The possibility or probability of the cases of milk and butter which he placed on the seat falling and striking the horse was as obvious to him as it could have been to the defendant. The plaintiff had ample time and opportunity to leave the alleged dangerous position he occupied on the wagon after the time Frederickson began placing the cases of milk and butter on the footboard, and before the horse started down the hill. (Tr. 70, 71.)

Plaintiff testified that Frederickson said to him that if he (plaintiff) did not take the cases of milk and butter he would have to quit (Tr. 36 and 70); but such threat, even if made by Frederickson, did not justify plaintiff in continuing to occupy an ob-



viously dangerous position, when there was no promise by Frederickson or by any other person representing defendant to remove the danger or to make plaintiff's position or the place he was required to occupy in order to perform his work more safe in the future.

In *Union Pac. R. Co. v. Marone*, 246 Fed. 916, at 924, the court, through Judge Sanborn, said:

"A servant assumes the ordinary risks and dangers of his employment and the extraordinary risks and dangers which he knows and appreciates. Neither the order of a vice-principal to the servant to work in a dangerous place, or in a dangerous way, nor his assurance of the servant's safety, nor the servant's fear of losing his job, will release the servant from his assumption of the risk and danger where they were readily observable and were known and appreciated by him, unless the vice-principal makes a promise to remove them as an inducement for the servant's continuance in the service."

And the court cites numerous authorities to sustain the doctrine announced.

In the consideration of the fifth and last reason assigned why the court should have granted the defendant's motion for an instructed verdict, we insist the plaintiff's testimony shows that his injuries were caused by his own negligence. He tes-

tified that the wagon dropped into a hole or rut in the snow, and that he and a case of milk fell on the side in the bank, and he slid under the wagon, and the wagon wheel ran over his leg. (Tr. 37.) He didn't state that he could not have avoided the hole or rut, nor did he state that he did not see the hole or rut, or that he did not know of its presence. He was familiar with that part of the street, and had passed over it on the same morning prior to the accident. He did not testify that the horse became unmanageable on account of the case of milk slipping from the wagon and striking the horse; nor did he testify that he was unable to control the horse because he was compelled to put one of his hands on the two cases of milk; nor did he testify that he was unable to control the horse for any other reason. He did testify that he fell from the wagon when it dropped into a hole or rut in the snow. The evidence, read in the most favorable light for the plaintiff, does not show that the extra cases of milk and butter which Frederickson placed on the footboard of the wagon caused the accident which resulted in plaintiff's injuries. Plaintiff testified that Frederickson put the cases of milk and butter on the footboard and he (plaintiff) placed them on the seat. (Tr. 62, 64.) The case of milk or butter

which fell from the wagon and struck the horse evidently fell from the seat where it had been placed by the plaintiff. Plaintiff testified as follows (Tr. 69) :

“I told him the wagon was loaded and there was no more could get on—if he found room to put them on.”

Evidently the plaintiff did not think the extra cases which he says Frederickson insisted on placing on the wagon would render his position dangerous or perilous; in any event, he was willing to take the risk, and if the placing of the extra cases on the wagon constituted negligence, plaintiff's acquiescence, assistance and participation in such act rendered him plainly guilty of contributory negligence. There is no allegation in the complaint, nor is there any evidence in the record, that the wagon was in any manner defective or unsafe, nor is there any allegation in the complaint, or evidence in the record that the horse used by the plaintiff at the time of the accident was unmanageable, excitable, or that such horse was in any respect unfit for the purpose for which he was being used. Defendant relies solely in this action on the alleged negligence of Frederickson in insisting on the plaintiff carrying on the wagon the extra cases of milk and butter

which plaintiff says Frederickson placed on the footboard, and he (plaintiff) placed on the seat beside him. It is apparent, if there was any negligence in such action, as before stated in this brief, it was the negligence of a fellow-servant, and that the plaintiff was guilty of contributory negligence on account of his participation in the act which he claims caused the accident.

*Musser-Sauntry Land, Logging & Mfg. Co. v. Brown*, 126 Fed. 141.

*St Louis Cordage Co. v. Miller*, 126 Fed. 495.

*McAdoo v. Angellott*, 271 Fed. 268.

*Maki v. Union Pac. Coal Co.*, 187 Fed. 389.

*Chicago, B. & Q. R. Co. v. Shalstrom*, 195 Fed. 725.

*Bunt v. Sierra Butte Gold Mining Co.*, 138 U. S. 483, 11 Sup. Ct. 464.

*The Westport*, 136 Fed. 391.

*Lamson v. American Ax & Tool Co.*, 58 N. E. 585.

*Mast v. Kern*, 54 Pac. 950.

<sup>22-207-A</sup>  
The fifth specification of error avers that the court erred in giving to the jury the second paragraph of Instruction No. 5. (Tr. 146.) Defendant timely excepted to such instruction. (Tr. 151 and 152.) By that instruction the court told the jury



that if Frederickson had no authority to direct the plaintiff as to the manner in which the latter performed his work, then Frederickson was not a vice-principal of the defendant, but plaintiff and Frederickson were fellow-servants. From such instruction the jury must have inferred that if Frederickson had any authority, no matter how limited, to direct the plaintiff as to the manner in which he performed his work, Frederickson was a vice-principal of defendant. Unless the instruction warrants such an inference, we submit it is purposeless and meaningless, so far as guiding the jury in the performance of their duties as jurors. But the latter part of the instruction shows that the court must have intended to advise the jury that if Frederickson had any authority to direct plaintiff as to the manner in which the latter performed his work, then Frederickson was a vice-principal, because the court says in that part of the instruction that plaintiff's right to recover depended on his showing, first, that he was subject to Frederickson's order, and, second, that Frederickson was responsible for the way in which the wagon was loaded, including the quantity of said load.

If such be the law, then every foreman, no matter how limited his authority may be, is a vice-



principal, since every foreman has some authority to direct the men in the performance of the work that he and they have been employed to accomplish. If he had no authority or control over the men in the prosecution of such work, he would not be a foreman. One might be a foreman over only a few men, and might be doing the same kind and character of work as those under him, and yet might be responsible to the master or the master's representative for the manner in which the work was performed. But such power of direction of the men under him, and such responsibility to the master for the character of the work performed would not of themselves make him a vice-principal of the master. A vice-principal is one who directly represents the master in some matter of provision, because it is the duty of the master to provide and the duty of the servant to operate. A mere foreman of a gang of men, who, with them, is engaged in operative work, is not a vice-principal, but according to the instruction criticized, such a foreman would be a vice-principal.

In *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, the court said:

“No testimony was offered by the defendant, and at the close of plaintiff's testimony the defendant

asked the court to direct a nonsuit, which motion was overruled, to which ruling an exception was duly taken. In its charge to the jury the court gave this instruction: 'If the injury results from negligence or carelessness on the part of one so placed in authority over the employe of the company, who is injured, as to direct and control that employe, then the company is liable.' . . . . .

". . . . Prima facie, all who enter into the employ of a single master are engaged in a common service, and are fellow servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow servants."

In *James Stewart & Co. v. Newby*, 266 Fed. 287, at page 294, the court said:

"The basic fact of all liability of the master is the servant's agency. He acts as it were by power of attorney. If the power is special and limited, the master's liability is limited accordingly; if broad and general, his liability is naturally extended. If the supervision is of such character as to charge the foreman with the duty of inspection, his knowledge becomes the knowledge of the master, and entails an immediate liability which does not pertain to servants of lower order not so charged. The foreman may be charged with the duty of maintenance or repair, in which case, both his knowledge and his duty become the knowledge and duty of the master, so as to require him, not only to exercise reasonable diligence to discover, but also to provide against danger. On the other hand, the

servant not charged with such duty has a right to rely upon the master's fulfillment of his obligation. He need not anticipate that the master will be negligent; the law's requirement is an assurance to him that the master has done his duty. Whether the foreman is charged with a nondelegable duty of the master, in a particular case, as above stated, is a question of fact to be determined from all the evidence. If there is no testimony to show such fact, the court should charge, as a matter of law, that the foreman is a fellow servant, because the mere fact that he is a foreman is not sufficient."

*Union Pac. R. Co. v. Marone*, 246 Fed. 916.

*Alaska Treadwell Gold Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40.

*Nor. Pac. R. Co. v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848.

*Northern Pac. R. Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983.

*Northern Pac. R. Co. v. Dixon*, 194 U. S. 338, 24 Sup. Ct. 683.

*Martin v. R. R. Co.*, 166 U. S. 399, 17 Sup. Ct. 603.

*Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843.

*New England R. Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85.

*Wood v. Potlatch Lumber Co.*, 213 Fed. 591.

*Olson v. Coal Navigation Co.*, 104 Fed. 574.

*The Westport*, 136 Fed. 391.

In specification of error No. III we criticise instruction No. 6. (Tr. 146 and 147.) Timely exception was taken to the instruction by the defendant. (Tr. 152.) We submit instruction No. 6 is erroneous, because it assumes that Frederickson was a vice-principal of the defendant, since it impliedly advises the jury that plaintiff was bound to obey Frederickson's orders, and if such obedience resulted in plaintiff's injuries, defendant would be liable therefor. If Frederickson were a vice-principal of defendant, and as such vice-principal gave certain orders to plaintiff, and the latter obeyed such orders and sustained injury on account of such obedience, through no fault or negligence of his own, and the danger incident to the execution of such orders was latent and not apparent to plaintiff, then plaintiff would be entitled to recover from defendant. But if Frederickson were a fellow-servant of plaintiff, as we contend the evidence clearly shows, then the plaintiff is not entitled to recover, even though he received orders from Frederickson, the execution of which caused his injuries, regardless of whether or not the plaintiff was guilty of negligence himself. In other words, if Frederickson was a fellow-servant of plaintiff at the time of the accident, and his negli-



gence occasioned plaintiff's injuries, defendant is not liable, even though plaintiff was free from negligence.

We wish to refer the court to all of the authorities cited to sustain our objections to and criticism of instruction No. 5. It cannot be successfully contended that instructions Nos. 5 and 6 referred to were satisfactorily explained by other instructions to the jury. It is true the court did, in instruction No. 3 (Tr. 144 and 145) define a vice-principal, and, we think, correctly so. The court in that instruction did say that because one is superior in grade, rank or authority to another does not make him any more the representative of the master than the one lower in position. But nowhere in the court's instructions does the court say that only a vice-principal may give orders to a servant. The trial judge, in the opinion overruling defendant's motion for a new trial (Tr. 196) said:

"Defendant criticises the second paragraph in the court's instructions, No. 5, saying, 'That the court assumes that if Frederickson had any authority to direct the plaintiff as to the manner in which the plaintiff performed his work then Frederickson was a vice-principal of defendant.' It is difficult to read that meaning from this instruction. The instruction is that plaintiff's right to



recover was dependent upon his showing that he was subject to Frederickson's orders and that Frederickson was responsible for the way the wagon was loaded, including the quantity of said load. The whole must be read together and the meaning is plain that if he was subject to Frederickson's orders in the matter of loading the wagon then the corporation would be liable if Frederickson was guilty of negligence which places plaintiff in an unnecessarily dangerous position. All this is made plain by the other instructions, and courts have decided so often that instructions must be taken as a whole and that if one instruction is obscure but is explained by others there is no error, it seems hardly necessary to argue this matter any further."

The court's explanation of instruction No. 5 conclusively shows that the court intended to and did instruct the jury that plaintiff's right to recover was dependent, first, upon his showing that he was subject to Frederickson's orders, and, second, that the latter was responsible for the way the wagon was loaded, including the quantity of said load. The only conclusion the jury could reach from such instructions is that if plaintiff established those two propositions by a preponderance of evidence, he would be entitled to recover judgment against defendant. We content that it was necessary for plaintiff to prove another and additional vital fact

before he could establish defendant's liability, and that is, that Frederickson was a vice-principal of the defendant when he gave such orders. Prima facie, all servants in the common employ of a single master are fellow-servants. In the second paragraph of instruction No. 5, and in instruction No. 6 (Tr. 146, 147), specifications of error Nos. II and III, the jury were impliedly told by the court that if plaintiff were subject to Frederickson's orders, and Frederickson was responsible for the way in which the wagon was loaded, including the quantity of its load, Frederickson was a vice-principal of defendant, because if Frederickson was not acting in the capacity of a vice-principal in ordering plaintiff to take the extra cases of milk and butter, defendant could not be liable for the result of the execution of such order. Even if there were in the record evidence tending to show that Frederickson was a vice-principal of defendant, such alleged evidence was contradicted by the evidence on behalf of defendant. Assuming but not admitting, therefore, that the court rightfully denied defendant's motion, for an instructed verdict, he should have instructed the jury to determine from the evidence whether or not Frederickson was acting in the capacity of a vice-principal of

defendant when he ordered plaintiff to overload the wagon, as plaintiff claims, if the jury should find that he gave such orders.

The court, in instruction No. 5, specification of error No. II, assumed that the conferring of authority on Frederickson by defendant to direct plaintiff as to the size of the load to be carried on the wagon, and the manner in which the wagon should be loaded, made Frederickson a vice-principal of defendant. If that instruction correctly states the law, then any servant who has any authority, no matter how limited, to direct any other servant of the same master with reference to any kind or character of work, is a vice-principal of the master. Every foreman, therefore, regardless of the extent of his authority or the number of men to whom he is empowered to give orders, is a vice-principal. We submit the doctrine announced in that instruction is contrary to every decision of the Supreme Court of the United States and of this court, where the common-law fellow-servant rule has been expounded and determined.

Paragraph 1 of instruction No. 7 (Tr. 147), specification of error No. IV, is erroneous because there is no evidence in the record to warrant the jury in find-

ing that Frederickson was a vice-principal, since the uncontradicted testimony of O'Neill and Frederickson (Tr. 90, 91, 92, 93, 94, 102, 110, 111, 112, 113 and 119) shows that Frederickson and plaintiff were fellow-servants at the time of the accident. Timely exception was also taken to said instruction No. 7. (Tr. 153 and 154.) We wish to call the court's attention to the authorities cited in support of our objection to instruction No. 5.

Sub-division (b) of paragraph 2 of instruction No. 7 (Tr. 148), specification of error No. IV, wherein the court said to the jury: "If he was injured through the act of a fellow-servant, that is the act of an employe who had no controlling authority over him in the circumstances," is erroneous. It is a summary statement of the law given by the court to the jury, covering the relations of master and servant, and purports to be a definition of what a fellow-servant is. It in effect tells the jury that Frederickson was not a fellow-servant of the plaintiff, if Frederickson had any controlling authority over plaintiff. The instruction is vague and misleading as to the words "controlling authority," and the jury might well have taken such words to mean any authority to direct the plaintiff in any manner as to the performance of his work. Such is not the



law governing the evidence in this case, nor is it the law with reference to the relations of master and servant. Timely exception was taken to said instruction. (Tr. 154.) The authorities cited to sustain our objections to and criticism of instruction No. 5 are equally applicable in support of our objections to and criticism of this portion of instruction No. 7.

The court erred in refusing to give to the jury defendant's requested instruction No. 2 (Tr. 155), specification of error No. V, because the plaintiff's own testimony shows that he had ample time and opportunity to leave the wagon while Frederickson was placing the extra cases of milk and butter on the footboard of the wagon, which act on the part of Frederickson plaintiff claims caused the accident resulting in his injuries. (Tr. 53, 62, 64 and 69.)

Plaintiff knew the capacity of the wagon; he knew the character of the horse he was driving; he was thoroughly familiar with the street he was about to travel over; he had wide experience as a deliveryman in the town of Cordova, where the accident occurred; no promise was made to him by any vice-principal of defendant or even by Frederickson that he would not be required to overload the wagon in the future. The peril he was about

to assume, therefore, was as apparent to him as it could have been to Frederickson or anyone else. If he did not wish to assume such risk he should have left the wagon and refused to continue working for defendant in the capacity of a deliveryman.

In *Union Pac. R. Co. v. Marone*, 246 Fed. 916, at page 924, the court said:

“A servant assumes the ordinary risks and dangers of his employment and the extraordinary risks and dangers which he knows and appreciates. Neither the order of a vice-principal to the servant to work in a dangerous place, or in a dangerous way, nor his assurance of the servant’s safety, *nor the servant’s fear of losing his job*, will release the servant from his assumption of the risk and danger where they were readily observable and were known and appreciated by him, unless the vice-principal makes a promise to remove them as an inducement for the servant’s continuance in service.”

And the court cites numerous authorities to sustain the doctrine announced.

*American Car & Foundry Co. v. Allen*, 264 Fed. 647.

*Washington Terminal Co. v. Sampson*, 289 Fed. 577.

*Chicago, B. & Q. R. Co. v. Shalstrom*, 195 Fed. 725.

*Ford Motor Co. v. Casey*, 252 Fed. 120.

*Butler v. Frazee*, 211 U. S. 459, 29 Sup. Ct. 136.

We insist that defendant was entitled to a judgment, notwithstanding the verdict of the jury, because the complaint and the evidence conclusively show that plaintiff and Frederickson were fellow-servants at the time of the accident, and even if Frederickson's negligence occasioned plaintiff's injuries, the defendant is not liable therefor.

We have accepted as true plaintiff's testimony regarding Frederickson's orders and conduct. Frederickson denies that he ordered plaintiff to take the extra cases of milk and butter, but that he (Frederickson) told plaintiff that his load was large enough without taking on any more, but that plaintiff said he could take one case more, and that plaintiff did take another case and place it on the seat of the wagon. (Tr. 117, 118.) But for the purpose of determining whether or not defendant's motion for an instructed verdict in favor of defendant should have been granted, plaintiff's testimony as to Frederickson's orders and conduct immediately prior to the accident must be taken as true, our contention being that, conceding the verity of all of the evidence in the record favorable to

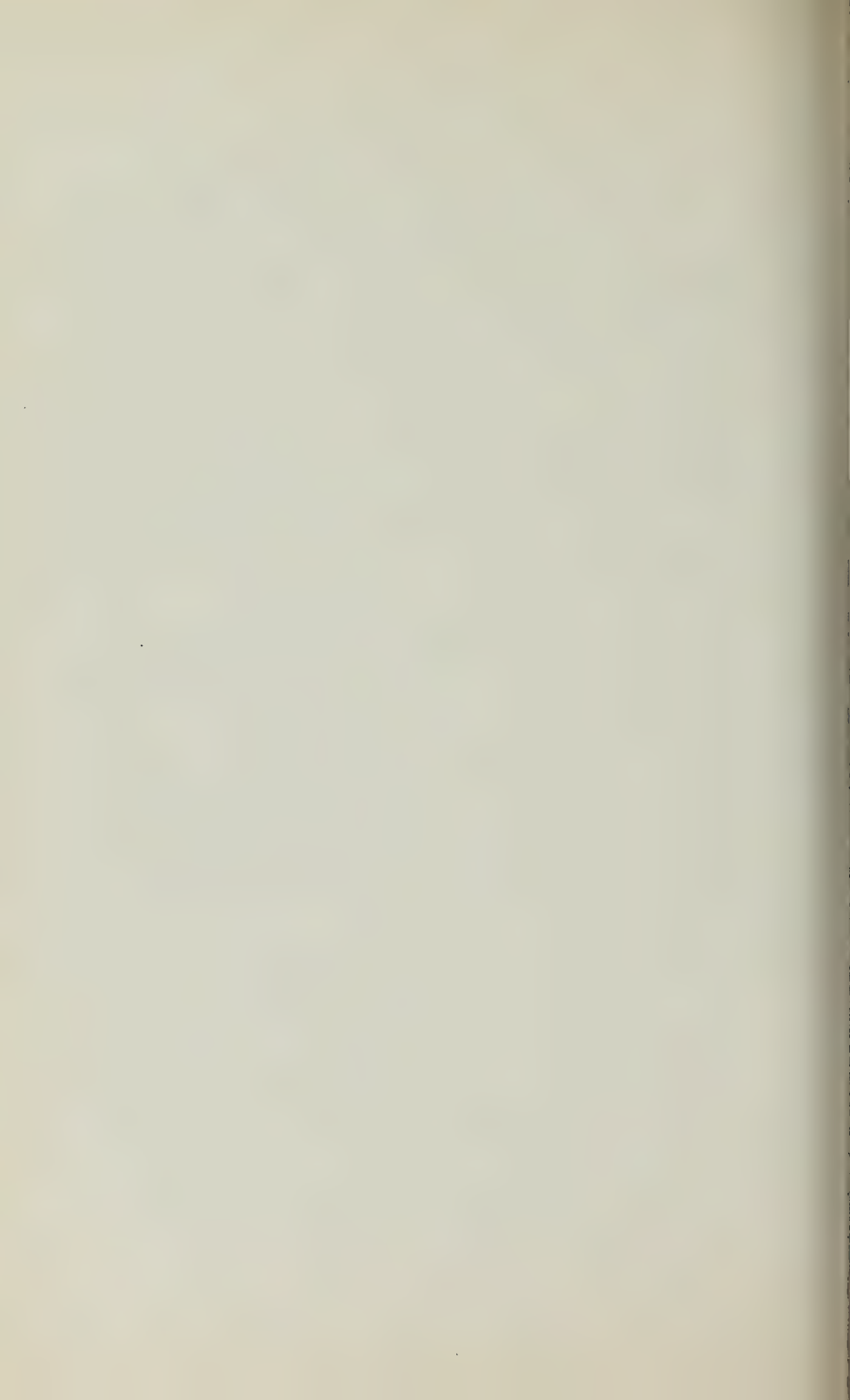
plaintiff, the same is not sufficient to warrant the court in submitting the case to the jury, and the court should have instructed a verdict for the defendant, in accordance with the latter's request, after all of the evidence on both sides had been submitted.

We respectfully submit that the judgment of the trial court should be reversed, with a direction to that court to dismiss the action, or in any event to grant a new trial.

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and

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*Attorneys for Plaintiff in Error.*





NO. 4095

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In the  
**United States Circuit Court  
of Appeals**

For the Ninth Circuit

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THE BLUM-O'NEILL COMPANY, a Corporation,  
Plaintiff in Error

vs.

F. J. SULLIVAN,

Defendant in Error

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Upon Writ of Error to the United States District Court  
for the Territory of Alaska, Third Division

**Brief for Defendant in Error**

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FRANK H. FOSTER,

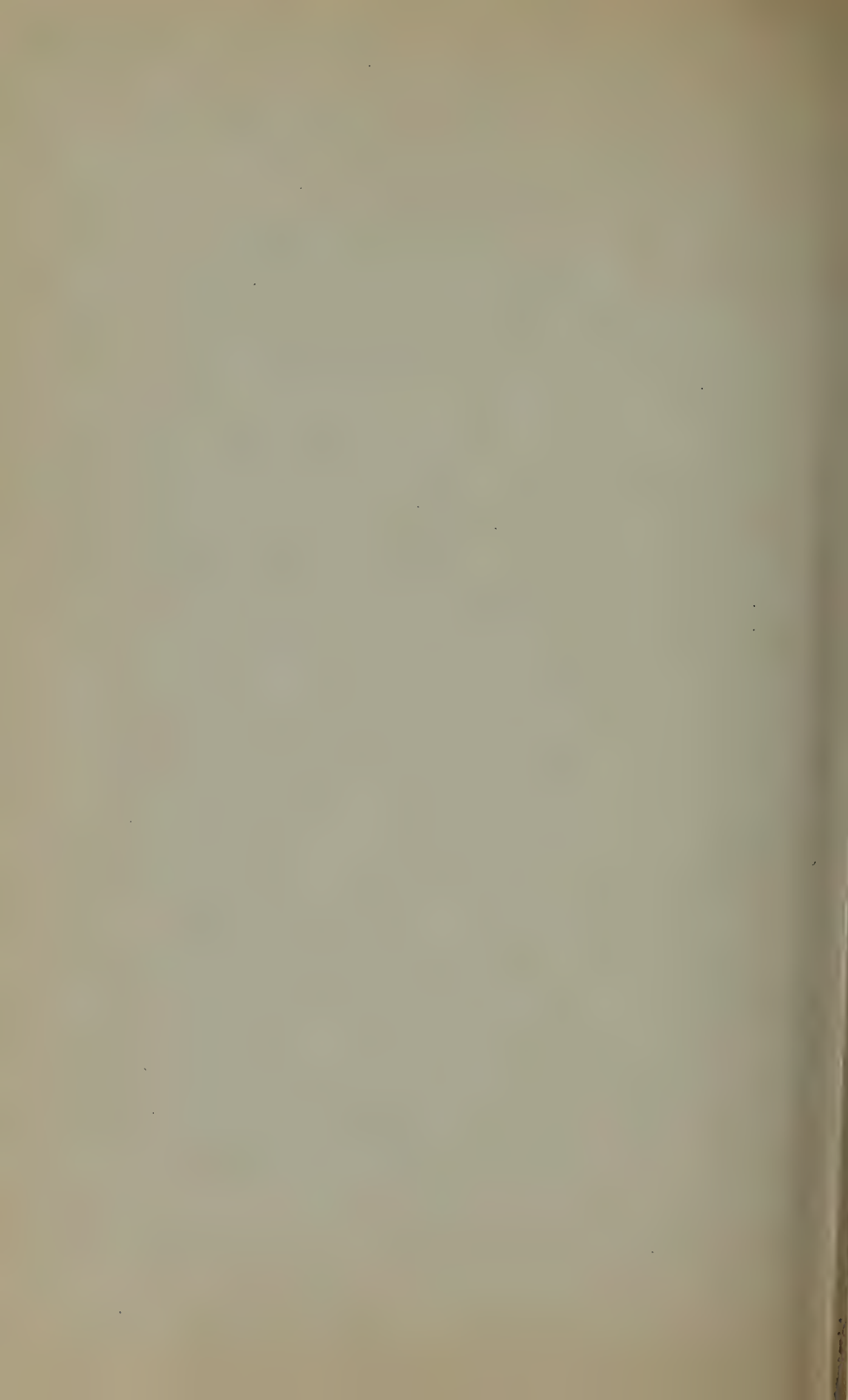
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Attorneys for defendant in error.

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Upon Writ of **Error** to the United States District Court  
for the Territory of Alaska, Third Division

**Brief for Defendant in Error**

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Statement of the Case

Sullivan sued defendant company to recover damages for personal injuries sustained while in its employ. There was a verdict for Sullivan. Defendant company sued out a writ of error.



We discuss the errors assigned, as follows:

I.

As to the admissibility of certain testimony given in support of the complaint. (Assignment of Errors Nos. I. and II.)

II.

As to alleged insufficiency of the complaint; motion for a nonsuit, and motion for a directed verdict. (Assignment of Errors Nos. III and IV).

III.

Assignments V, VI, VII, VIII, IX, X, XI and XII are directed to certain instructions given by the Court and to other instructions refused.

## ARGUMENT

I.

(A) Objection to admission of Plaintiff's exhibit "A".

Plaintiff in error has taken an exception to the admission in evidence of a certain X-ray plate which was taken by Dr. Beeson at Anchorage and admitted as Plaintiff's Exhibit "A". The testimony of witness Sullivan shows that the X-ray plate was developed in his presence and he positively identifies the exhibit

as the picture taken. As stated by the Judge of the trial court in his opinion on motion for new trial (Record, p. 195): "All that is required in such cases is that the photograph be sufficiently identified." The evidence of the witness Sullivan identifying the plate was uncontradicted and his creditability was for the jury.

(B) Objections to the admission of the testimony of Dr. J. L. Bulkley.

The plaintiff in error takes exception to the testimony of Dr. Bulkley, a witness for defendant in error. By his testimony Dr. Bulkley clearly distinguishes between testimony as to the plate, which testimony is given by him as an expert in the taking of X-ray pictures, and in the testimony given by him as to the condition of the injured limb of defendant in error, based upon personal examinations made by him as a surgeon, whose skill is expressly admitted by plaintiff in error.

"Mr. Dimond: We will admit he is fully qualified as a doctor." (Record, p. 81).

"Mr. Dimond: I will admit Dr. Bulkey can take X-Ray pictures and is generally qualified as a physician." (Record, p. 82).

"Mr. Dimond: We will admit his general qualifications." (Record, p. 83).

## II.

The general demurrer alleges the complaint does not state facts sufficient to constitute a cause of action, for failure to plead sufficient to show the vice principalship of Frederickson, alleged to be superintendent. We submit the complaint alleges facts sufficient to make a case.

## III.

The motions for nonsuit and for directed verdict are based upon the insufficiency of proof and the failure of proof on the part of Sullivan to prove the vice principalship of Frederickson, alleged superintendent of the defendant company.

Under the evidence of the defendant in error Sullivan, as supported by witness Satterlee, the witness Frederickson was employed as superintendent in sole charge of the warehouse department of plaintiff in error. His duties as such, according to the testimony of these witnesses, included the management of retail sales of merchandise in the building over which he had exclusive control. These retail sales had no connection with the retail business handled by plaintiff in error at the main retail store and amounted to some considerable sum, as much as fifty or sixty dollars a day. It is further testified by defendant in

error, that at times the superintendent Frederickson employed and discharged men who were needed for short jobs, although defendant in error was employed by the head office of plaintiff in error corporation. It is further testified that superintendent Frederickson had sole charge and direction of the manner of the delivery of goods, the manner of loading wagons and the general conduct of the wholesale business of plaintiff in error. We contend that the above testimony is ample to place the question of the vice principalship of Frederickson directly before the jury, although nearly all of these statements were denied, in whole or in part, by the witnesses of plaintiff in error. The witness Sullivan was not impeached and his testimony, for the purpose of this appeal, must be taken as true.

Decisions of the United States Supreme Court, the Federal Courts and of the various states, on the question of vice principalship are so hopelessly conflicting as to make it almost impossible to determine what the true rule is. The Ross case, 112 U. S. 377, 28 Law Ed. 787, attempted to make the question of vice principalship dependent on position. The later cases modified and distinguished this rule and no satisfactory line of reasoning of any of the courts of the latter part of the nineteenth century seems to have been



arrived at. The better and more logical rule appears to be to the effect that the master is liable for any negligence which involves the breach of one of his personal duties.

“Whether the employee whose negligence caused the injury was or was not a vice principal is determined by the nature of the functions which he was, as a matter of fact, discharging at the time when the injury was received, and not by the appellation by which he was designated. His official denomination will not, of itself, determine whether or not he was a representative of the master.”

**Greenway vs. Conroy** (1894) 160 Pa., 185, 40 Am. St. Rep. 715, 28 Atl. 692.

**Miller vs. Southern R. Co.** (1891) 20 Or. 285, 26 Pac. 70.

**Moore vs. Dublin Cotton Mill** (1907) 127 Ga. 609, 10 L. R. A. (N. S.) 772, 56 S. E. 839.

**Smith vs. American Car & Foundry Co.**, (1906) 122 Mo. App. 610, 99 S. W. 790.

In *Baltimore & Ohio Railway Co., vs Baugh*, 149 U. S. 368-387, the court says: “A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work. . . .”

The later decisions of the Federal Courts undoubtedly follow this rule. See *Collins vs. Barner*, 268 Fed. 699.

In the case at bar there is testimony which must have been persuasive to the jury in order for them to find a verdict for defendant in error to the effect that Frederickson directed defendant in error as to the manner of loading goods on the delivery wagon. (Record, p. 30).

Q. When you were delivering goods who, if any-one, gave directions as to the loading?

A. There was just two of us there and Mr. Frederickson gave me orders as to the loading.

Q. What kind of directions or orders?

A. Well, he directed me as to how to put on my orders to the best advantage. If he would see me loading he would tell me the best way, or say this is a better way, and tell me where to go or bring something from the warehouse some place, but he always told me to come back and where to go afterwards.

Q. And as to the placing of the orders on the wagons?

A. Sometimes he helped me and most of the time I did it myself.

Q. Were you directed by anyone but Frederickson?

A. By Frederickson, always.

It is undisputed that the proximate cause of the injury of Sullivan was the overloading and improper loading of the wagon which, according to the evidence of defendant in error, was directed and super-

vised by Frederickson. We contend that this improper loading brings this case directly within the rule of the Baugh case, and was an exercise by Frederickson of the non-delegable duty of Fredickson's employer to maintain a safe place for Sullivan to work.

“Duty of furnishing reasonably safe place to work, including reasonably safe means of access thereto, cannot be delegated so as to remove master from liability.”

**Hartman vs. Toyo Kisen Kaisha SS. Co.,** 244 Fed. 561.

**Missouri Valley Bridge & Iron Co., vs. Walquist,** 243 Fed. 120.

**Cincinnati N. O. & T. P. Ry Co., vs. Hall,** 243 Fed. 76.

**Sutherland vs. Buckeye Cotton Oil Co.,** 259 Fed. 709.

“A servant discharging nondelegable duty of master to furnish safe appliances is a “vice principal” instead of a “fellow servant.”

**Consolidated Interstate-Callahan Mining Co. vs. Witkouski,** 249 Fed. 833, 162 C. C. A. 67.

Upon the questions raised as to negligence of fellow servant, assumption of risk, and contributory negligence, we contend the matter was rightly submitted

to the jury by the trial court. Error cannot be successfully predicated upon the submission to a jury of a question of fact, even though disputed. The record supports the action of the trial court. The provisions of the Alaska Code make the jury the exclusive judges of the facts and of the creditability of the witnesses.

Sec. 1064. All questions of fact other than those mentioned in section one thousand and sixty-five shall be decided by the jury, and all evidence thereon addressed to them.

Sec. 1065. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the constructions of statutes and other writings and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it; and whenever the knowledge of the court is by this code made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it as conclusive.

(Compiled Laws of Alaska, 1913).

The modern rule is laid down by the supreme court in *Kreigh vs. Westinghouse*, 214 U. S. 249-258:

“Questions of negligence do not become questions of law to be decided by the court, except where the facts are such that all reasonable men must draw the same conclusion from them, and the case is not to be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had

upon any view which can be properly taken of the facts the evidence tends to establish" Gardner vs. Mich. Cent. Railroad 150 U. S. 349, 361.

"The question of contributory negligence on the part of the plaintiff was for the jury."

**Cunard Steamship Co. vs. Carey**, 119 U. S. 245.

"The question of negligence on the part of the master and contributory negligence was for the jury."

**Northern Pacific Ry. Co., vs. Mortensen**, 63 Fed. 530.

**Nelson vs. New Orleans and N. E. R. Co.**, 100 Fed. 731.

**Bethlehem Iron Co. vs. Weiss**, 100 Fed. 45.

**Smith vs. Southern Ry.**, 75 Fed. 105.

**Thompson vs. Chicago M. and St. P. Ry Co.**  
14 Fed. 564.

**Amate vs. Northern Pac. R. Co.**, 46 Fed. 561.

"On conflicting evidence in servant's action for injury through fall of scaffold, whether he was required to go on it in the course of employment, held for jury."

**E. I. Dupont de Nemours & Co., vs. Kelly**, 252 Fed. 523; 164 C. C. A., 439.

"In action for death of employee of lumber company, killed when load of planks fell from car which employee and others were moving, question of employee's assumption of risk, held under evidence, for jury."



**Sundin vs. Edward Rutledge Timber Co.,** 249  
Fed. 809; 162 C. C. A. 43.

“Negligence is a question of law only, when the facts are such as to lead to but one conclusion.”

**Gardner vs. Michigan Central Railroad Co.,** 150  
U. S. 349-361; 37 Law Ed. 1107.

**Chicago, etc., Ry vs. Healy,** 86 Fed. 249.

**Aetna L. Ins. Co. vs. Vandecar,** 86 Fed. 290.

**Omaha Street Railway Co. vs. Craig,** 39 Neb.  
617; 58 N. W. 213.

**McGovern vs. Philadelphia & R. R. Co.,** 235 U.  
S. 389.

**Chesapeake and O. R. Co. vs. De Atlay,** 241 U.  
S. 310.

“We have no doubt that the evidence raised disputed questions of fact as to whether defendant was guilty of the negligence charged in the complaint, and whether plaintiff was guilty of contributory negligence, as set up in the answer, both of which were properly determinable solely by the jury, and that the court committed prejudicial error when it passed upon those issues of fact and directed a verdict.”

**Gunn vs. Standard Oil Co.,** 275 Fed. 934.

As stated in Labbatt's Master and Servant, Volume 4, page 4988:

“The culpability of either of the parties to the action is always a matter for the jury to determine, whenever there is a conflict of testimony as to the facts

upon which the existence or nonexistence of that culpability hinges; and also where those facts, although they may be clearly established or undisputed, are of such a nature that reasonable men may fairly differ upon the question whether they do or do not import culpability."

Further recent authorities to the effect that all questions of fact are for the jury to determine, whether on the question of vice principalship, assumption of risk, contributory negligence and fellow servant, have been cited by the trial judge in his opinion on motion for a new trial. (Record, pp. 193-4):

**Myers vs. Pittsburgh Coal Co.** 233 U. S. 184;

**Tex. & Pac. R. Co. vs. Prater**, 229 U. S. 177.

**C. R. I. & P. R. Co. vs. Brown**, 229 U. S. 317.

**Tex. & Pac. R. Co. vs. Harvey**, 228 U. S. 319.

**Brewery Co. vs. Schmidt**, 226 U. S. 162.

**Davis vs. Scroggins**, 284 Fed. 760.

**Dahlen vs. Hines**, 275 Fed. 817.

**Gunn vs. Standard Oil**, 275 Fed. 932.

**St. L. R. Co. vs. Jeffreys**, 276 Fed. 73.

**Woodward vs. Bimbaugh**, 276 Fed 1.

**Gover vs. A. P. A.**, 278 Fed. 927. (This was an Alaska case in the Ninth Circuit).

**Davis vs. Reynolds**, 280 Fed. 363.

**Watson Coal & M. Co. vs. Greeson**, 284 Fed. 510.

**Atlantic Coast Line R. Co. vs. Williams**, 284 Fed. 262.

**Collins vs. Barner**, 268 Fed. 699. (A case of a badly loaded elevator).

**Patton vs. Kenmont Coal Co.**, 268 Fed. 334.

**Dunton vs. Hines**, 267 Fed. 452.

**Southern R. Co., vs. Miller**, 267 Fed. 376.

**Gibson vs. Germat**, 267 Fed. 305.

**McMillan vs. Alaska Fish Co.**, 266 Fed. 26.  
(Another Alaska case in the Ninth Circuit).

## ASSUMPTION OF RISK

We respectfully refer this Honorable Court to the recent reported case of Panama R. Co. versus Johnson, 289 Fed., 964, and quote from the opinion of the circuit judge, pp. 978-9, as follows:

“In *Narramore vs. Cleveland C. C., & St. L. Ry. Co.*, 96 Fed. 298, 301, 37 C. C. A. 499, 501 (48 L. R. A. 68) Judge Taft, writing for the Circuit Court of Appeals of the Sixth Circuit, said:

“‘Assumption of risk’ is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant’s duty shall be at the servant’s risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or

contributes to cause the injury to himself, but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume."

In *St. Louis Cordage Co. vs. Miller*, 126 Fed. 495, 502, 61 C. C. A. 477, 484 (63 L. R. A. 551) Judge Sanborn writing for the Circuit Court of Appeals for the Eighth Circuit, said:

"Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment, and to relieve his master of liability therefor."

In *Jellow vs. Fore River Ship Building Co.*, 201 Mass. 464, 467, 87 N. E. 906, 908, the Supreme Judicial Court of Massachusetts said on this same subject:

"It should not be overlooked that, where the use of the terms 'risk' and 'acceptance of the risk' are involved, the true question is whether, in incurring the particular danger in question, the plaintiff accepted the risk in the sense that by continuing at his work he agreed to relieve the defendant from the possible results. The plaintiff consequently, not only must be shown to have known of the risk, but, by implication from his conduct, must be found to have voluntarily assumed it." *Wagner vs. Boston Elevated Railway*, 188 Mass. 437, 440, 441, and cases cited."

That the act of the servant in assuming the risk must have been voluntary and not under constraint is well established law. In *Shearman & Redfield on Negligence*, Vol. 1 (6th Ed.) Sec. 207, the law is said to be that:

“A risk must be voluntarily assumed, to relieve the master from liability. Risks incurred under coercion are not assumed.”

And in section 211A it is said:

“As already stated, it is now held by the most conservative authorities that a servant is not deprived of his right to recover for defects caused by his master's negligence, arising or first coming to the servant's notice, after he has entered into service, unless he assumes the risk of his own free and unconstrained will. If, therefore, he continues to incur the risk of such defects under any kind of necessity, or coercion, he does not voluntarily assume the risk, and is not, necessarily, debarred from recovery thereby.”

See *Richmond, etc., Ry. Co. vs. Norment*, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep, 827; *O'Malley vs. South Boston Gaslight Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161; *Lee vs. St. Louis M. and S. E. R. Co.*, 112 Mo. App. 372, 87 S. W. 12; *Rase vs. Minneapolis, St. Paul, etc., R. Co.*, 107 Minn. 260, 120 N. W. 360, 21 L. R. A. (N. S.) 138; *Montgomery vs. Seaboard Air Line Ry.*, 73 S. C. 503, 53 S. E. 987; *Elie vs. Cowles*, 82 Conn. 236, 73 Atl. 285.

And in *Labatt on Master and Servant*, Vol. 4 (2nd Ed.), Sec. 1365, p. 3934, it is said:



“If a danger is not so absolute or imminent that injury must almost necessarily result from obedience to an order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order.”

### III.

Counsel for plaintiff in error has selected certain parts of the instructions of the court and predicated error thereon. In the words of Judge Carland of the Eighth Circuit as set forth in his opinion in the case of St. Louis & S. F. Ry., Co., vs. Jeffries, reported in 276 Fed. 73:

“We do not deem it necessary to cite authorities in support of the proposition that counsel may not select particular portions from the charge for the purpose of assigning error, but the whole charge must be taken together, and if it appears that the case is fully and fairly stated, the mere fact that certain passages standing alone would be subject to criticism, is not important. The jury in this case were told that they must take the charge as a whole, and we have no doubt that the charge as a whole fully, correctly and fairly presented the case to the jury.”

As to the refusal of the Court to grant certain instructions, we submit that the instructions asked for are fully covered by the instructions given.

Defendant in error, therefore, respectfully submits that the case, on the whole record, wholly fails to disclose any reversible error.

Respectfully submitted,

FRANK H. FOSTER,

L. V. RAY.

Attorneys for defendant  
in error.



In the  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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THE BLUM-O'NEILL COMPANY, a Corporation,  
*Plaintiff in Error*  
*vs.*  
F. J. SULLIVAN,  
*Defendant in Error*

*Upon Writ of Error to the United States District  
Court of the Territory of Alaska,  
Third Division.*

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**REPLY BRIEF OF PLAINTIFF IN ERROR**

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*Attorneys for Plaintiff in Error*





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---

**REPLY BRIEF OF PLAINTIFF IN ERROR**

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For the sake of convenience, the parties will be designated in this brief plaintiff and defendant, as they were in the trial court.

On pages 5 and 6 of brief of plaintiff he states:

“Decisions of the United States Supreme Court, the federal courts and of the various states, on the question of vice-principalship are so hopelessly con-

flicting as to make it almost impossible to determine what the true rule is. The *Ross* case, 112 U. S. 377, 28 Law Ed. 787, attempted to make the question of vice-principalship dependent on position. The later cases modified and distinguished this rule and no satisfactory line of reasoning of any of the courts of the latter part of the nineteenth century seems to have been arrived at."

We submit that a careful examination and analysis of the decisions of the Supreme Court of the United States and the federal courts will disclose the fact that there is no such conflict in the holdings of those courts on the question of vice-principalship as is contended by plaintiff. It is true the holding in the *Ross* case cited by plaintiff and decided by the Supreme Court of the United States in 1884 is in conflict with later decisions of that court on the question of vice-principalship, but even the decision in that case would not warrant this court in holding that Frederickson was a vice-principal of the defendant at the time of plaintiff's alleged injury. Judge Field, in the *Ross* case, held that a conductor of a railway train was a vice-principal of the company operating the railway, because he had full and complete control of the train and all the employees operating the same, but there is no evidence in this record to show that Frederickson

had such authority over plaintiff. He did not select the plaintiff's horse or wagon; it is not claimed that he had the power to direct the plaintiff what route he should select or travel over; he had no control over the plaintiff as to when he should begin to work or when he should discontinue work; he did not employ or discharge the plaintiff. All of such authority over the plaintiff was exercised by defendant's vice-principal O'Neill.

The *Ross* case, however, has not been followed by the Supreme Court of the United States. It was modified by that court in *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. Rep. 914, and was expressly overruled by that court in *New England v. Conroy*, 175 U. S. 323, 20 Sup. Ct. Rep. 85. The *Baugh* case was decided by the supreme court in 1893 and the *Conroy* case in 1899. In the *Conroy* case the court said, among other things (20 Sup. Ct. 93):

“While the opinion in the *Ross* case contains a lucid exposition of many of the established rules regulating the relations between masters and servants, and particularly as respects the duties of railroad companies to their various employees, we think it went too far in holding that a conductor of a freight train is *ipso facto* a vice-principal of the company. An inspection of the opinion shows that

that conclusion was based upon certain assumptions not borne out by the evidence in the case as to the powers and duties of conductors of freight trains."

The court in the *Baugh* case, *supra*, sets forth lucidly the common law rule of the duties and obligations that a master owes to his servant, and so far as we have been able to discover, that exposition of the common law rule regarding such duties and obligations has never been modified by the Supreme Court of the United States or by any of the federal courts. The court in that case said (13 Sup. Ct. 921):

"Again, a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work or by which he is to be surrounded shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity and cannot be obviated. But within such limits the master who provides the place, the tools and the machinery owes a positive duty to his employee in respect thereto. That positive duty does not go to

the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employee by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employee, or the latter's right to insist that reasonable precautions shall be taken to secure safety in these respects, therefore it will be seen that the question turns rather on the character of the act than on the relations of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. But, it may be asked, is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge. But the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery, and so the former is as fully discharged when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution."



The plaintiff does not contend that the defendant was negligent in the employment of Frederickson, nor does he contend that Frederickson was not a fit and competent person to perform the work for which he was employed by defendant, nor does he contend that the wagon he was driving was defective, or the horse inefficient or difficult to manage.

The *Baugh* case and the *Conroy* case have been uniformly followed by the Supreme Court of the United States and the federal courts whenever the common law rule of fellow servant has been called in question. Many of the cases are cited on pages 13, 14 and 23 of defendant's original brief, and as stated in our original brief, the same rule was announced for Alaska by the Supreme Court of the United States in *Alaska Treadwell Gold Mining Company v. Whelan*, 168 U. S. 86, 18 Sup. Ct. Rep. 40, which case has been cited with approval by the Supreme Court of the United States and many of the federal courts, including this court. See cases cited, pages 13 and 14 of defendant's original brief.

### ASSUMPTION OF RISK

Plaintiff contends (pages 13, 14, 15 and 16 of his brief) that he did not assume the risk of his employment voluntarily. He admits in his testimony (Tr. 36, 69 and 70), that he protested against Frederickson putting any more cases of milk or butter on the wagon; that the latter said he would have to take them or quit. It further appears from plaintiff's testimony (Tr. 62, 63, 70 and 71), that Frederickson handed the cases of milk and butter to plaintiff, who placed them on the seat and foot-board of the wagon; that Frederickson obtained these cases from the door of the warehouse about twenty feet away from the wagon, and that he, Frederickson, carried such cases in his hands, one at a time, from the door of the warehouse to the wagon.

The increasing danger of the load as each extra case was placed on the wagon and replaced by the plaintiff was just as evident to plaintiff as it could have been to Frederickson or any one else, in fact, such danger should have been more obvious to plaintiff, since he was on the wagon, and since the evidence shows that he was more familiar with the streets over which he would pass with the load that

day. Plaintiff by reason of his position on the wagon was even in a better position than Frederickson to realize the danger involved in piling some seven cases of milk and butter on the seat and footboard of the wagon. Plaintiff's conclusion that he did not have time to get down from the wagon and remove to a place of safety during the time that the extra cases were being put on the wagon is not consonant with the facts testified to by himself. His own testimony shows clearly that Frederickson carried each box a distance of some twenty feet and then returned for another box, and that he (plaintiff) stowed the boxes away on the wagon, on the seat and the footboard around him.

There can be no doubt that plaintiff knew of the perils and dangers of overloading the wagon as he claims was done at the instance of Frederickson. We wish to call the court's attention to a discussion of the defense of assumption of risk found on pages 1207 to 1244, 28 L. R. A. (N. S.). The author of such note, on page 1221 of that volume, says:

"But such liability of the master is only *prima facie*, and may be rebutted, and is rebutted, according to practically every decision in which the question is expressly before the court and adjudicated by it, (with the exception of decisions in Missouri and North Carolina), by proof that the servant,

with actual or constructive knowledge of the defects and an appreciation of the dangers, entered or continued in the employment without complaint of the defects and without any promise on the part of the master to remedy them. By so entering or remaining in the service, with such knowledge of the defects, the servant is held to have assumed the risk of such defects, even though they are the result of the master's violation of his duty."

In *Union Pac. R. Co. v. Marone*, 246 Fed. 916, at page 924, the court said:

"A servant assumes the ordinary risks and dangers of his employment and the extraordinary risks and dangers which he knows and appreciates. Neither the order of a vice-principal to the servant to work in a dangerous place, or in a dangerous way, nor his assurance of the servant's safety, nor the servant's fear of losing his job, will release the servant from his assumption of the risk and danger where they were readily observable and were known and appreciated by him, unless the vice-principal makes a promise to remove them as an inducement for the servant's continuance in the service. *Chicago, B. & Q. R. Co. v. Shalstrom*, 195 Fed. 725, 729, 115 C. C. A. 515, 45 L. R. A. (N. S.) 387, and cases there cited; *Seaboard Air Line v. Horton*, 233 U. S. 492, 496, 503, 504, 507, 508, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1 Ann. Cas. 1915B, 475; *Bunt v. Sierra Butte Gold Min. Co.*, 138 U. S. 483, 484, 485, 11 Sup. Ct. 464, 34 L. Ed. 1031; *Musser Sauntry, etc., Co. v. Brown*, 126 Fed. 141, 143,

144, 61 C. C. A. 207; Walker v. Scott, 67 Kan. 814-816, 818, 64 Pac. 615; Showalter v. Fairbanks, Morse & Co., 88 Wis. 376, 60 N. W. 257, 258; Toomey v. Steel Works, 89 Mich. 249, 50 N. W. 850, 851; Kean v. Rolling Mills, 66 Mich. 277, 33 N. W. 395, 399, 400, 11 Am. St. Rep. 492; Lamson v. American Axe & Tool Co., 177 Mass., 144, 145, 58 N. E. 585, 83 Am. St. Rep. 267, opinion by Holmes, chief justice, now Mr. Justice Holmes; Bradshaw, etc., v. Railway Co., (Ky.) 21 S. W. 346, 347."

*American Car & Foundry Co. v. Allen*, 264 Fed. 647.

It is obvious from the plaintiff's testimony that he voluntarily assumed the risk incident to the carrying of the extra cases of milk and butter on the wagon he was driving, and there is no testimony in the record that even indicates that he was promised by Frederickson or any other agent of the defendant that he would not be required to carry such loads thereafter.

Plaintiff (Tr. 69), gave the following answers to the following questions:

"Q. I believe you say you protested against him putting on the extra stuff?

"A. Yes, sir; I did.

"Q. What did you say?



“A. I told him the wagon was loaded and there was no more could get on—if he found room to put them on.

“Q. What did he say?

“A. He said he would put them on the footboard.

“Q. Did he say anything else?

“A. No, sir; he just carried them out and put them on the footboard.

“Q. He placed them on the footboard and you put them on the seat?

“A. Yes, he put two on the seat and I put the rest.”

Plaintiff's statement of the facts does not indicate the slightest coercion on the part of the defendant. It is true he says he protested against taking the extra cases, but his recital of Frederickson's statement to him concerning the matter and his reply thereto conclusively shows that he made no such protest, but merely said the wagon was loaded, and further stated to Frederickson if the later found room on the wagon to put them on. And after making such statement he proceeded to and did assist Frederickson in placing the cases on the wagon.

Accepting plaintiff's testimony as true, we submit there is nothing in the words or conduct of Frederickson with reference to the loading of the extra cases on the wagon that even suggests any coercive influence over plaintiff. Nor does such testimony show any unwillingness on plaintiff's part to assume all risk or danger which might or would be occasioned by loading and carrying on the wagon the extra cases of milk and butter which plaintiff claims Frederickson insisted should be done.

We respectfully submit the judgment of the trial court is erroneous and should be reversed, and the court directed to dismiss the action, or in any event to grant a new trial.

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*Attorneys for Plaintiff in Error*

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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LEE HING, also known as LEE GOOD MING,  
Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration,  
Port of San Francisco,  
Appellee.

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**Transcript of Record.**

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Upon Appeal from the Southern Division of the  
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Assignment of Errors.....	23
Certificate of Clerk U. S. District Court to Transcript on Appeal.....	28
Citation on Appeal—Copy.....	26
Citation on Appeal—Original.....	29
Demurrer to Petition for Writ of Habeas Corpus.....	12
Hearing on Demurrer.....	13
Minutes of Court—January 29, 1923—Hearing on Demurrer.....	13
Minutes of Court—July 30, 1923—Order De- nying Petition for Writ.....	20
Names of Attorneys of Record.....	1
Notice of Appeal.....	21
Opinion and Order Denying Petition for Writ of Habeas Corpus.....	14
Order Allowing Appeal.....	25
Order Denying Petition for Writ.....	20
Order to Show Cause.....	11
Petition for Appeal.....	22
Petition for Writ.....	2
Praecipe for Transcript of Record.....	1
Stipulation and Order Respecting Withdrawal of Immigration Record.....	27
Substitution of Attorney.....	21



## **Names of Attorneys of Record.**

For Petitioner and Appellant:

JOSEPH P. FALLON, Esq., San Francisco,  
Cal.

For Respondent and Appellee:

UNITED STATES ATTORNEY, San Fran-  
cisco, Cal.

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In the Southern Division of the United States Dis-  
trict Court for the Northern District of Cali-  
fornia, Second Division.

No. 17,736.

In the Matter of LEE SOO, on Habeas Corpus.

### **Praeceptum for Transcript of Record.**

To the Clerk of said Court:

Sir: Please make copies of the following papers  
to be used in preparing transcript on appeal:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Demurrer to petition.
4. Minute order regarding immigration record.
5. Judgment and order dismissing order to show  
cause and denying petition for writ.
6. Substitution of attorney.
7. Notice of appeal.
8. Petition for appeal.

9. Assignment of errors.
10. Order allowing appeal.
11. Stipulation and order regarding immigration record.
12. Clerk's certificate.
13. Citation on appeal—original and copy.

JOSEPH P. FALLON,  
Attorney for Petitioner.

[Endorsed]: Filed Sep. 5, 1923. Walter B. Mal-  
ling, Clerk. By C. M. Taylor, Deputy Clerk. [1\*]

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In the Southern Division of the United States Dis-  
trict Court in and for the Northern District of  
California, First Division.

No. 17,736.

In the Matter of LEE SOO 21491/2-4 Ex. S. S.  
“Pres. Cleveland” October 10, 1922. On  
Habeas Corpus.

### **Petition for Writ.**

To the Honorable, United States District Judge,  
now presiding in the United States District  
Court, in and for the Northern District of  
California, First Division:

It is respectfully shown by the petition of the  
undersigned that Lee Soo, hereafter in this peti-  
tion referred to as “the detained,” is unlawfully  
imprisoned, detained, confined and restrained of his  
liberty by Edward White, Commissioner of Immi-

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\*Page-number appearing at foot of page of original certified Trans-  
cript of Record.



gration for the port of San Francisco, at the Immigration Station at Angel Island, County of Marin, State and Northern District of California, Southern Division thereof; that the said imprisonment, detention, confinement and restraint are illegal and that the illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner that the said detained is a Chinese person and alien not subject or entitled to admission into the United States under the terms and provisions of the Acts of Congress of May 6th, 1882; July 5th, 1884; November 3d, 1893, and April 29th, 1902, as amended and re-enacted by Section 5 of the Deficiency Act of April 7th, 1904, which said acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts; and that he, the said Commissioner intends to deport the said detained away from and out of the United States to the Republic of China.

That the Commissioner claims that the said detained arrived at the port of San Francisco on or about the 10th day of October, 1922, on the S.S. "President Cleveland," and thereupon made application to enter the United States as a son of a native-born citizen thereof, and that the application of the said detained to enter the United States as a citizen thereof was denied by the said [2] Commissioner of Immigration and a Board of Special Inquiry, and that an appeal was thereupon taken from the excluding decision of the said Commissioner of Immigration and the said Board of

Special Inquiry to the Secretary of the Department of Labor, and that the said Secretary thereafter dismissed the said appeal; that it is claimed by the said Commissioner that in all of the proceedings had herein the said detained was accorded a full and fair hearing; that the action of the said Commissioner and the said Board of Special Inquiry and the said Secretary was taken and made by them in the proper exercise of the discretion committed to them by the statute in such cases made and provided, and in accordance with the regulations promulgated under the authority contained in said statutes.

But, on the contrary, your petitioner alleges, on his information and belief, that the hearing and proceedings had herein, and of the said Board of Special Inquiry, and the action of the said secretary was and is in excess of the authority committed to them by the said rules and regulations and by said statutes and that the denial of the said application of the said detained to enter the United States as the son of a native-born citizen thereof, was and is an abuse of the authority committed to them by the said statutes in each of the following particulars hereinafter set forth:

#### I.

It is positively and affirmatively established by the evidence and is admitted and conceded by the said Commissioner, the Board of Special Inquiry which denied the detained the right of admission into the United States, and the Secretary of Labor who affirmed the excluding decision of the said

board, that the relationship of father and son exists between the detained and Lee Hing, the person appearing as and claiming to be his father.

## II.

It is positively and affirmatively established by the evidence and is admitted and conceded by the said Commissioner, the [3] Board of Special Inquiry which denied the detained the right of admission into the United States, and the Secretary of Labor who affirmed the excluding decision of the said board, that the said Lee Hing was duly and regularly readmitted into the United States as a native-born citizen thereof by the appropriate immigration authorities when he returned to the port of San Francisco on the SS. "Manchuria," May 31, 1906, and again upon the occasion of his return to the United States when he arrived at the port of San Francisco on the SS. "Mongolia," June 1, 1915; it is further admitted and conceded by each and all of the said officials that the said Lee Hing was so admitted into the United States upon each of said occasions as a citizen thereof. It is further admitted and conceded by the said officials, and each of them, that the said Lee Hing had been arrested under a departmental warrant of arrest charging him with being illegally within the United States, and it is further admitted and conceded by each and all of the said officials hereinbefore enumerated that the Assistant Secretary of Labor did upon August 3, 1916, cancel the said warrant of arrest, and in cancelling said warrant of arrest held that he was not satisfied to hold that the said Lee

Hing was in the United States in violation of law; and it is further admitted and conceded by each and all of the said officials that there was issued to the said Lee Hing Certificate of Identity No. 23775 upon the 7th day of September, 1916, and that said certificate was so issued to the said Lee Hing as a native-born citizen of the United States showing his readmittance as such into the United States, and said certificate contained the following endorsement thereon:

“This is to certify that the person named and described on the reverse side hereof has been regularly admitted to the United States as of the statute indicated, whereof satisfactory proof has been submitted.”

And your petitioner alleges, upon his information and belief, that it is admitted and conceded by each and all of the said officials hereinbefore enumerated that no separate other, further, or additional evidence attesting or detracting from the American citizenship of the said Lee Hing was place before the [4] said officials or any of them in the matter of the application of this detained to enter the United States than was previously placed before the Secretary of Labor at the time of the cancellation of the said warrant of arrest against the said Lee Hing wherein it was found by the said Assistant Secretary of Labor that he was not satisfied to hold that the said Lee Hing was in the United States in violation of law. And your petitioner alleges, upon his information and belief, that the action of the said Commissioner, the said Board



of Special Inquiry and the said secretary, in treating and considering that the said Lee Hing is a native-born citizen of the United States of America, and leaving him at liberty and at large within the United States as such a native-born citizen thereof in so far as his own individual status is concerned, and denying to the said Lee Hing the rights and privileges of his said status as a citizen of the United States in so far as his said son Lee Soo, the detained herein, is concerned, was and is an abuse of authority and a misconstruction of the terms and provisions of Section 1993 of the Revised Statutes of the United States, and in violation of the provisions of Article 5 in Amendment to the Constitution of the United States in this that the detained is deprived of his liberty without due process of law.

### III.

You petitioner alleges, upon his information and belief, that the evidence presented before the said Commissioner, the said Board of Special Inquiry, and the said secretary, upon the application of the said detained to enter the United States, which said evidence is now hereby referred to with the same force and effect as if set forth in full herein, was of such a conclusive kind and character establishing the birth of the father of the detained within the United States and hence showing the said detained to be the son of the native-born citizen thereof, and which said evidence was of such legal weight and sufficiency that it [5] was an abuse of discretion on the part of the said Com-



missioner and the said board, and the said secretary to deny the said detained the right of admission into the United States and instead thereof to refuse to be guided by said evidence, and the said adverse action of the said Commissioner and the said board, and the said secretary was, your petitioner alleges, upon his information and belief, arrived at and was done in denying the said detained the fair hearing and consideration of his case to which he is entitled. Said action was done in excess of the discretion committed to the said secretary and the said board, and to the said Commissioner of Immigration. And your petitioner further alleges, upon his information and belief, that the said action of the said secretary and the said Commissioner, and the said board, was influenced against the said detained and against his witnesses solely because of his being of the Chinese race.

That your petitioner has not in his possession any part or parts of the said proceedings had before the said Commissioner, the said Board of Special Inquiry and the said secretary, and it is for said reason impossible for your petitioner to annex hereto any part or parts of said immigration records; the copy of the record having been formerly in the hands of your petitioner, but having been sent to Washington, D. C., and not having been since returned to your petitioner, and the notice of the sustaining of the action of the said excluding decision by the Board of Special Inquiry having been transmitted from Washington by telegraph, and for said reason the copy of the said record is

not now available for the use of your petitioner. Your petitioner further alleges that the only complete copy of the said record is now in the hands of the Department of Labor at Washington and it is impossible to procure a copy of same or any part thereof in time to submit with this petition and to enable your petitioner to prevent the deportation of the said detained.

That it is the intention of the said Commissioner to deport the said detained out of the United States and away from [6] the land of which he is a citizen by the SS. "President Pierce," sailing from the port of San Francisco upon the 28th day of December, 1922, at 1:00 o'clock P. M., and unless this Court intervenes to prevent said deportation the said detained will be deprived of residence within the land of his citizenship.

That the said detained is in detention as aforesaid and for said reason is unable to verify this said petition upon his own behalf and for said reason petition is verified by your petitioner, but for and as the act of the said detained.

WHEREFORE your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner commanding and directing him to hold the body of the said detained within the jurisdiction of this court, and to present the body of the said detained before this Court at a time and place to be specified in said order, together with the time and cause of his detention, so that the same may be inquired into to the end

that the said detained may be restored to his liberty and go hence without day.

LEE GOON.

GEO. A. McGOWAN,  
Attorney for Petitioner,  
550 Montgomery Street,  
San Francisco, Calif. [7]

United States of America,  
State and Northern District of California,  
City and County of San Francisco,—ss.

The undersigned, being first duly sworn, according to law, doth depose and say:

That he is the petitioner named in the foregoing petition; that the same has been read and explained to him and he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

LEE GOON.

Subscribed and sworn to before me this 23d day of December, 1922.

[Seal]

JOSEPH PENSA,  
Notary Public.

[Endorsed]: Filed Dec. 26, 1922. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.  
[8]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 17,736.

In the Matter of LEE SOO 21491/2-4 Ex. SS.  
"President Cleveland." October 10, 1922. On Habeas Corpus.

**Order to Show Cause.**

Good cause appearing therefor, and upon reading the verified petition on file herein:

IT IS HEREBY ORDERED that Edward White, Commissioner of Immigration for the Port of San Francisco, appear before this Court on the 6th day of January, 1923, at the hour of 10 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein as prayed for, and that a copy of this order be served upon the said Commissioner.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration as aforesaid, or whoever, acting under the orders of the said Commissioner or the Secretary of Labor, shall have the custody of the said Lee Soo are hereby ordered and directed to retain the said Lee Soo within the custody of the said Commissioner of Immigration, and within the jurisdiction of this Court until its further order herein.

Dated at San Francisco, California, December 26, 1922.

FRANK H. RUDKIN,  
United States District Judge.

[Endorsed]: Filed Dec. 26, 1922. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [9]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,736.

In the Matter of LEE SOO on Habeas Corpus.

**Demurrer to Petition for Writ of Habeas Corpus.**

Comes now the respondent, Edward White, Commissioner of Immigration at the port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

**I.**

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

**II.**

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JOHN T. WILLIAMS,

United States Attorney,

BEN F. GEIS,

Assistant United States Attorney,

Attorneys for Respondent.



[Endorsed]: Filed Jan. 29, 1923. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[10]

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At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 29th day of January, in the year of our Lord, one thousand nine hundred and twenty-three. Present: The Honorable WM. C. VAN FLEET, District Judge.

No. 17,736.

In the Matter of LEE SOO on Habeas Corpus.

**Minutes of Court—January 29, 1923—Hearing on Demurrer.**

This matter came on regularly this day for hearing on order to show cause as to the issuance of a writ of habeas corpus herein. Geo. A. McGowan, Esq., appeared as attorney for petitioner and detained. P. A. Robbins, Esq., was present for and on behalf of the respondent, and filed demurrer to petition, and all parties consenting thereto, it is ordered that the Immigration Records be filed as Respondent's Exhibits "A," "B," "C," "D," "E," "F," "G," and "H," and that the same be considered as part of original petition. After hearing the respective attorneys, the Court ordered said matter submitted on briefs to be filed in 5, 5 and 3 days. [11]

In the District Court of the United States, Northern  
District of California, Southern Division.

No. 17,736.

In the Matter of LEE SOO, on Habeas Corpus.

**Opinion and Order Denying Petition for Writ of  
Habeas Corpus.**

GEORGE A. McGOWAN, of San Francisco, Attorney  
for the Petitioner.

JOHN T. WILLIAMS, U. S. Attorney, and BEN  
F. GEIS, Assistant U. S. Attorney, Attorneys  
for the Respondent.

Lee Soo, admittedly born in China, applied for admission at the port of San Francisco as a son of one Lee Hing, also known as Lee Good Ming, alleged to be a native-born citizen of the United States, in the right given such an applicant by Sec. 1993, R. S. His application was denied by the Immigration Authorities and upon appeal to the Secretary of Labor the decision of the Board of Special Inquiry was affirmed and the appeal dismissed. Thereupon the present petition for *habeas corpus* to release the applicant from custody by the Immigration Authorities, in which he is held, was filed in his behalf. The petition is very general, consisting largely of allegations of conclusions, but by stipulation in open court the entire immigration records and files involved in the application were introduced as an amendment and supplement to the petition to which petition, [12] as thus amended, the Government

has demurred generally upon the ground that it presents no case in law or fact warranting the issuance of the writ.

The finding against the petitioner was based upon the conclusion reached by the Immigration Authorities that petitioner had failed to sustain the burden resting upon him of establishing the facts which would fix his status as that of a citizen of the United States under Section 1993 aforesaid; that is, while the Government did not seek to controvert the alleged fact that petitioner was the son of the Lee Hing above described the conclusion was reached that the evidence was insufficient to show that the latter was as claimed a native-born citizen of the United States and that consequently the rights assumed by petitioner as resulting from his relationship to the latter must fall to the ground. This conclusion resulted from the disclosure of the immigration records, made a part of the petition, that petitioner's alleged father had gotten his lines crossed and tangled up with another Lee Hing, also claiming to be a native-born citizen, in a manner to render it doubtful which of the two, if either, was such citizen, the claim of both being based partly at least on the same records.

The facts briefly stated are these: Petitioner's alleged father, on October 5, 1904, made an affidavit (XB, P5) setting forth that he was born in San Francisco in 1876 and was thereafter taken to China by his father in 1882, where he remained until 1899, when he returned to the United States on the SS. "Belgie," holding ticket No. 162, and on

March 2, 1899, was duly landed as a native by the then Collector of Customs. This affidavit bore an endorsement showing that the affiant thereafter, on October 13, 1904, departed from the United States on the SS. "Mongolia," and attached to the record was an affidavit of one Henry C. Dibble, an attorney (XB, P4), to the effect that the person in whose behalf it was made was the [13] same Lee Hing, who was No. 162, returning on SS. "Belgie," November, 1898—who affiant claims he represented at that time. This Lee Hing returned to this country on the SS. "Manchuria" 3, 1906 (XB, P3), and was landed the following day by the then Commissioner. On this latter occasion one Inspector Gasaway, on May 13, 1906, made a report to the inspector in charge of the Chinese Bureau that: "In re case of Lee Hing, No. 64—"Manchuria," May 13, 1906. I have compared the enclosed photograph with that in file in his previous landing and find them to be one and the same person." It appears, however, from a comparison of the photograph of this Lee Hing, appearing at page 5 of Exhibit "B," that the photograph attached to pages 5 and 12 of Exhibit "C" (being the photograph of the person previously admitted as No. 162 on the SS. "Belgie") was quite evidently that of a wholly different person. It further appeared that Lee Hing, the alleged father of the petitioner, subsequently made an application on October 21, 1912 (XB, P24), to the Commissioner of Immigration at Boston, Massachusetts, for a Native's Return Certificate, Form 430, which was thereafter granted by the Commis-



sioner of Immigration at Seattle, Washington, November 8, 1912, and that he departed from the latter port on the SS. "Minnesota," December 16, 1912; that he thereafter returned through the port of San Francisco on the SS. "Mongolia," June 1, 1915, and was admitted as a returning citizen (XB, P25), his photograph as he appeared at the latter date, appearing at page 26, Exhibit "B." But the record also discloses that on April 1, 1912, another Lee Hing (known also as Lee Ging Sing) made an application to the Commissioner at San Francisco for a Native's Return Certificate, Form 430 (XC, P35), which was granted and he departed for China on the SS. "Mongolia," April 10, 1912. He returned on the SS. "Mongolia" April 22, 1913, and was duly admitted on his certificate, as a native (XC, P36). [14] This latter Lee Hing claimed to be the Lee Hing who had been admitted as No. 162 on the "Belgie," November, 1918; and comparison of the photograph appearing on pages 5 and 10 of Exhibit "C" with that appearing on the application for a return certificate (XC, P35), and the photograph appearing at page 37 of the same record tends strongly to confirm the correctness of his claim that he was the Lee Hing who was previously admitted as a native on March 2, 1899, by the then Collector of Customs.

From these facts it was deduced and found by the Board of Special Inquiry that this last-mentioned record of 1898 did not refer to the father of the petitioner and it was accordingly found by them that the record did not sustain petitioner's conten-



tion as to the fact of his father's citizenship and the judgment of exclusion followed.

There are other facts bearing, more or less remotely, upon the question involved, but they are not essential to be stated.

VAN FLEET, District Judge.—(After stating the facts): The issuance of the writ is urged upon two grounds; (1) that petitioner was not accorded a fair hearing, and (2) that his right of admission being based upon his claim of citizenship, he is entitled as matter of right to have that claim judicially determined. Both contentions are based upon a misapprehension of the law.

1. The first proposition is based upon the claim that the evidence preponderated so strongly in favor of the petitioner's contention as to the status of his father that the adverse determination is itself evidence that the Board of Special Inquiry was actuated by bias and prejudice against petitioner and in and of itself discloses that the hearing was unfair. But it is not controverted that the record discloses a serious [15] discrepancy, sufficient to raise a substantial conflict, on this essential feature of petitioner's case, and this being so, the question of fact involved was essentially one for the determination of that board and is not open to review by this Court. And the fact, if it be a fact, that the evidence may have preponderated in favor of petitioner's contention does not tend to show that the hearing was in any proper sense unfair or that the decision of the board involved an abuse of discre-

tion. *White vs. Chan Wy Sheung*, 270 Fed. 764. As there held, "a denial of a fair hearing cannot be established by showing that the decision of the immigration officials was against the weight of the testimony. *Chin Yow vs. United States*, 208 U. S. 8." There is nothing in the record to bring the case within the doctrine of *Quock Jan Fat vs. White*, 253 U. S. 455.

2. Nor does the fact that the petitioner's alleged right of admission is based upon his claim of citizenship entitle him to, in such an instance as the present, to a judicial determination of that claim before he may be deported. While one lawfully within the United States, claiming to be a citizen thereof may not competently be deprived of his right to be here by mere execution order, but he is entitled to have the question of his asserted citizenship judicially determined before he may be removed (*Ng Fung Ho vs. White*, 259 U. S. 276) no such right attaches to one who, like the petitioner, is seeking admission to the country for the first time and the fact that his claim to admission may be based upon the asserted right of citizenship does not bring him within the category of those entitled to invoke the jurisdiction of our courts for the determination of that question. *United States vs. Ju Toy*, 198 U. S. 253; *Tang Tun vs. Edsell*, 223 U. S. 673. [16]

The distinction is between the case of one lawfully within our borders defending his asserted right to remain, and one who, like petitioner, is in legal contemplation without our borders seeking to get in. In the latter case the rights of the ap-

plicant are controlled by the Immigration Act, Ng Fung Ho vs. White, *supra*.

The writ is denied and the petition will be dismissed.

[Endorsed]: Filed July 28, 1923. Walter B. Maling, Clerk. [17]

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At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 30th day of July, in the year of our Lord, one thousand nine hundred and twenty-three. Present: the Honorable WM. C. VAN FLEET, District Judge.

No. 17,736.

In the Matter of LEE SOO, on Habeas Corpus.

**(Minutes of Court—July 30, 1923—Order Denying  
Petition for Writ.)**

The petition herein, heretofore submitted being now fully considered and the Court having filed its opinion, it is ordered that the writ be denied and the petition dismissed. [18]

In the District Court of the United States, Northern  
District of California, Southern Division.

No. 17,736.

In the Matter of LEE SOO, on Habeas Corpus.

**Substitution of Attorney.**

I hereby substitute ———, Esq., as attorney  
in the above-entitled case, in my place and stead.

GEO. A. McGOWAN.

I hereby agree to be substituted as attorney in  
the above-entitled case.

JOSEPH P. FALLON.

[Endorsed]: Filed Aug. 8, 1923. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy. [19]

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In the Southern Division of the United States Dis-  
trict Court, for the Northern District of Cali-  
fornia, Second Division.

No. 17,736.

In the Matter of LEE SOO, on Habeas Corpus.

**Notice of Appeal.**

To the Clerk of said court, and to the Honorable  
John T. Williams, United States Attorney in  
and for the Southern Division of the United  
States District Court, for the Northern Dis-  
trict of California, First Division:

You and each of you will please take notice that  
Lee Hing, also known as Lee Good Ming, the

petitioner in the above-entitled matter, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment rendered, made and entered herein July 28th, 1923, denying the petition for a writ of Habeas Corpus filed herein.

JOSEPH P. FALLON,  
Attorney for Petitioner.

[Endorsed]: Filed Aug. 8, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[20]

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In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 17,736.

In the Matter of LEE SOO on Habeas Corpus.

**Petition for Appeal.**

Comes now Lee Hing, also known as Lee Good Ming, the petitioner in the above-entitled matter, and respectfully shows:

That on the 28th day of July, 1923, a judgment and order was made by the above-entitled Court and entered herein denying a writ of habeas corpus in the above-entitled matter and dismissing the petition of said petitioner for a writ of habeas corpus in which said judgment and order certain errors were committed to the prejudice of the above named Lee Soo, which more fully appear by his assignment of errors filed herewith.



WHEREFORE, your petitioner prays that an appeal may be allowed to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that the Clerk of the above-entitled Court be directed to make and prepare a transcript of all the papers, proceedings and record of the above-entitled matter and to transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit, within the time allowed by law, and for an order that the execution of the warrant of deportation of said Lee Soo be stayed pending this appeal.

JOSEPH P. FALLON,  
Attorney for Petitioner.

[Endorsed]: Filed Aug. 8, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[21]

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In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 17,736.

In the Matter of LEE SOO on Habeas Corpus.

**Assignment of Errors.**

Now comes the petitioner, Lee Hing, also known as Lee Good Ming, through his attorney, Joseph P. Fallon, Esq., and sets forth the errors he claims the above-entitled Court committed in denying his petition for a writ of habeas corpus as follows:

## I.

That said Court erred in not granting said petition for a writ of habeas corpus.

## II.

That said Court erred in denying said petition for a writ of habeas corpus.

## III

That said Court erred in holding that the petition did not show or tend to show that said Lee Soo did not obtain or was accorded a full and fair hearing or any legal hearing by said Immigration officers or by said Secretary of Labor.

## IV.

That the Court erred in not holding that the evidence submitted upon the application of the said detained to enter the United States was of such a conclusive kind and character and was of such legal weight and sufficiency that it was an abuse of discretion on the part of said immigration officials not to be guided thereby.

JOSEPH P. FALLON,

Attorney for Petitioner.

[Endorsed]: Filed Aug. 8, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[22]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 17, 736.

In the Matter of LEE SOO on Habeas Corpus.

**Order Allowing Appeal.**

It appearing to the above-entitled Court that Lee Hing, also known as Lee Good Ming, the petitioner herein, has this day filed and presented to the above Court his petition praying for an order of this Court allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and order of this Court denying a writ of habeas corpus herein and dismissing his petition for said writ, and good cause appearing therefor;

IT IS HEREBY ORDERED that an appeal be and the same is hereby allowed as prayed for herein; and

IT IS HEREBY FURTHER ORDERED that the Clerk of the above-entitled court make and prepare a transcript of all the papers, proceedings and record in the above-entitled matter and transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit within the time allowed by law; and

IT IS FURTHER ORDERED that the execution of the warrant of deportation of said Lee Soo be and the same is hereby stayed pending this appeal and that the said Lee Soo be not removed

from the jurisdiction of this Court pending this appeal.

Dated August 8th, 1923.

WM. C. VAN FLEET,  
United States District Judge.

[Endorsed]: Filed Aug. 8, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[23]

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**(Citation on Appeal—Copy.)**

United States of America,—ss.

The President of the United States, to John D. Nagle, Commissioner of Immigration, Port of San Francisco, and John T. Williams, United States Attorney. GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein Lee Hing, also known as Lee Good Ming, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable \_\_\_\_\_, United States District Judge for the Southern Division of

the Northern District of California, this — day of September, A. D. 1923.

, JOHN S. PARTRIDGE,  
United States District Judge.

[Endorsed]: No. 17,736. United States District Court for the Northern District of California. Lee Hing, also known as Lee Good Ming, Appellant, vs. John D. Nagle, Commissioner of Immigration of San Francisco. Citation on Appeal. [24]

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In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 17,736.

In the Matter of LEE SOO on Habeas Corpus.

**Stipulation and Order Respecting Withdrawal of  
Immigration Record.**

It is hereby stipulated and agreed by and between the attorney for the petitioner and appellant herein and the attorney for the respondent and appellee herein, that the original immigration record in evidence and considered as part and parcel of the petition for writ of habeas corpus upon hearing of the demurrer in the above-entitled matter, may be withdrawn from the files of the Clerk of the above-entitled court and filed with the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit, there to be considered as a part and parcel of the record on appeal in the



above-entitled case with the same force and effect as if embodied in the transcript of the record, and so certified to by the Clerk of the Court.

Dated San Francisco, Cal., September 5, 1923.

JOHN T. WILLIAMS,

Attorney for Respondent and Appellee.

JOSEPH P. FALLON,

Attorney for Petitioner and Appellant.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said immigration record therein referred to may be withdrawn from the office of the Clerk of this Court and filed in the office of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by this Court. [25]

Dated San Francisco, Cal., September 5th, 1923.

JOHN S. PARTRIDGE,

United States District Judge.

[Endorsed]: Filed Sep. 5, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [26]

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**Certificate of Clerk U. S. District Court to Transcript on Appeal. •**

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 26 pages, numbered from 1 to 26, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the Matter of Lee Soo on

Habeas Corpus, No. 17,736, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein), and the instructions of the attorney for petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Nine Dollars and Eighty-five Cents (\$9.85) and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal issued herein (page 28).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of September, 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk. [27]

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**(Citation on Appeal—Original.)**

United States of America,—ss.

The President of the United States, to John D. Nagle, Commissioner of Immigration, Port of San Francisco, and John T. Williams, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of

San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein Lee Hing, also known as Lee Good Ming, appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PART-  
RIDGE, United States District Judge for the  
Southern Division of the Northern District of Cali-  
fornia, this 5th day of September, A. D. 1923.

JOHN S. PARTRIDGE,  
United States District Judge.

[Endorsed]: No. 17,736. United States Dis-  
trict Court for the Northern District of California.  
Lee Hing, also Known as Lee Good Ming, Appel-  
lant, vs. John D. Nagle, Commissioner of Immigra-  
tion, Port of San Francisco. Citation on Appeal.  
Filed Sep. 5, 1923. Walter B. Maling, Clerk. By  
C. W. Calbreath, Deputy Clerk. [28]

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[Endorsed]: No. 4096. United States Circuit  
Court of Appeals for the Ninth Circuit. Lee Hing,  
also Known as Lee Good Ming, Appellant, vs. John  
D. Nagle, as Commissioner of Immigration, Port of  
San Francisco, Appellee. Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed September 7, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.





No. 4096

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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LEE HING, also known as LEE GOOD MING,  
*Appellant,*

VS.

JOHN D. NAGLE, as Commissioner of Immi-  
gration, Port of San Francisco,  
*Appellee.*

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BRIEF FOR APPELLANT.

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JOSEPH P. FALLON,  
*Attorney for Appellant.*

FILED

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U. S. CIRCUIT COURT



No. 4096

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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LEE HING, also known as LEE GOOD MING,  
*Appellant,*

VS.

JOHN D. NAGLE, as Commissioner of Immi-  
gration, Port of San Francisco,  
*Appellee.*

**BRIEF FOR APPELLANT.**

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**Statement of the Case.**

This is an appeal from the order and judgment of the lower court sustaining the demurrer interposed and denying a petition for a writ of habeas corpus. Lee Soo applied to enter the United States as a citizen thereof, he claiming to be the foreign-born son of Lee Hing, also known as Lee Good Ming, appellant herein, a native born citizen of the United States. His claim was based under Section 1993 of the Revised Statutes. He was denied admission by a board of special inquiry from whose decision an appeal was taken to the Secretary of

Labor at Washington, D. C., where the decision of said board was affirmed and he was ordered deported to China.

A petition for a writ of habeas Corpus was thereupon filed in the court below for his release from custody of the immigration authorities, with the result as stated in the opening paragraph hereof.

The history of the case has been so admirably and succinctly set forth in the brief of attorney G. W. Hott to be found in Exhibit "A", pages 37 to 42 inclusive, that I quote said brief at length herein:

"The applicant, Lee Soo, was born in China July 9, 1905. He applied for admission to the United States at San Francisco Oct. 10, 1922, as the son of Lee Hing, alias Lee Good Ming, a native born citizen of the United States.

The relationship is not disputed but the applicant was excluded by a board of special inquiry on the ground that the citizenship of the father was not established.

In our view of the case the only question involved is a point of law which has been judicially settled. It is conceded and it also appears from the official records that the father's status was adjudicated by the department in 1906 on his return from a trip to China; in 1912, when a return certificate was issued to him and in 1916 when a certificate of identity was issued to him as a native born citizen of the United States.

It does not appear necessary, in our view of the case, to enter into a detailed discussion of all the facts and evidence, but in order to

clearly understand the situation a brief review of the history of the case is essential.

The father of this applicant claims to have been born in San Francisco in 1876 and that he made three trips to China, (1st) departing March 26, 1882, with his father and other members of the family and returning Nov. 10, 1898, as #162 on the *Belgie*, (2nd) departing on the *Mongolia* Oct. 13, 1904, and returning on the *Manchuria* May 31, 1906, (3d) departing through the port of Seattle Dec. 16, 1912, and returning on the *Mongolia* June 1, 1915, being admitted as a native of the United States on all three trips.

It is conceded that the father of this applicant is the person who made the 1904-1906 and the 1912-1915 trips, the 1882-1898 trip only being in doubt.

In 1912 another Chinaman came forward and claimed that he was the Lee Hing who made the trip to China in 1882-1898 (claimed as the first trip for the father of this applicant) and on the presentation of certain records and a very brief examination, was granted a return certificate, with which he departed in that year and returned in 1913. He has made no further trips to China. For the reasons hereafter set forth, it seems clear to us that the latter claimant to the 1899 record is an imposter and that he had unlawful possession of the records which he presented. He waited fourteen years before claiming this record.

On the other hand the father of this applicant made a second trip to China about five and one-half years after his last arrival, claiming the 1899 record as his own. This trip was made at a time when there could not be any great difficulty in determining definitely, by comparing him



and his photograph with the photograph in the 1899 record; whether he was the proper claimant to the said 1899 record. He departed in 1904 on the affidavits of identity as was customary at that time. In his said affidavit dated Oct. 5, 1904, he sets forth, in substance, that he was born in San Francisco in 1876 and was taken to China by his father Lee Tuck Ng and his mother Mah Shee in 1882, where he remained until Nov. 10, 1898, returning on the Belgic as #162 and was landed as a native March 2, 1899, by John P. Jackson, Collector of the port, and that there is now on file in the "Chinese Bureau" of this port (San Francisco) all affidavits and proofs and decision of Collector Jackson ordering his landing March 2, 1899; that he is now going on a temporary visit to China and makes this affidavit in duplicate and appends thereto the affidavit of Henry C. Dibble, who was his attorney and attended to his case in 1898-1899. His affidavit was signed by him in English and attached thereto is his photograph, which is conceded to be the photograph of the father of this applicant.

There is also annexed to the affidavit just mentioned the affidavit of Henry C. Dibble the attorney above mentioned, executed before the same notary and bearing the same date. Attorney Dibble in this affidavit states:

'That he was the attorney who attended the case of Lee Hing #162 ex ss Belgic Nov. 1898; that some considerable time after the steamer arrived affiant was employed by Ching Goy Lang, a well known merchant and property owner in Chinatown whose wife, Lee See Moy, is the sister, as the records show, of said Lee Hing, whose photograph is annexed to the preceding affidavit of said Lee Hing.

Affiant further states that said Lee Hing was landed by the Collector, James P. Jackson, March 2, 1899, as a native; and affiant now identifies said Lee Hing whose photograph is annexed to the preceding affidavit, as aforesaid, as the same person who was so landed by Collector Jackson as a native March 2, 1899.'

As stated above, the two affidavits referred to were executed on the same day and before the same notary public, and Attorney Dibble positively identified the father of this applicant as the person he represented and who was landed in 1899. It is not disputed that the father of this applicant is the same person who departed in 1904 on the above mentioned affidavits.

The father of this applicant returned from the said 1904 trip in May 1906, and his case was assigned to inspector Gassaway for investigation, who reported: 'I have compared the enclosed photograph with that on file in his previous landing and find them to be one and the same person'. This report is attached to the departing affidavit of 1904 which contained the conceded photograph of the father of this applicant. The photograph 'on file in his previous landing' must have been the photograph attached to the 1898-1899 record, as above set forth, as this was his first and *only* 'previous landing'. Thus the father of this applicant was positively identified by his attorney prior to his departure in 1904, and by a Chinese inspector on his return from that trip in 1906, as the same person who was landed in 1899.

After his return in 1906 he spent several years in and around San Francisco and about 1910 he went to Boston where he remained until Dec. 1912, when he departed for China after

having his status preinvestigated, by way of Seattle.

During the time the father of this applicant was residing at Boston a second alleged Lee Hing appeared on the scene and on April 1, 1912, filed an application for a return certificate. He was briefly examined on the following day, presented what purported to be the 1899 landing record claimed by the father of this applicant, and eight days thereafter, April 10, 1912, departed for China, with a return certificate. He was represented in this proceeding by an attorney of San Francisco who was later indicted for wholesale fraud in Chinese cases. The inspector who investigated the case of this second Lee Hing says he is the same man whose photographs appear in the duplicate record on file. But when the father of this applicant applied for a return certificate in Oct. 1912, at Boston and filed affidavits which referred to his 1899 records on file at the port of San Francisco inspector Lorenzon reported, Nov. 16, 1912, that 'the prior landing papers cannot be located.'

Apparently it was not until 1915 that the 1899 landing records again came to light. In the meantime the second alleged Lee Hing returned from China (1913) and was immediately landed. No statement was taken from him except the brief form statement on the boat. Four days after his arrival he was in possession of a certificate of identity. The extreme haste in disposing of his case, both at the time of his departure and return, even smacks of suspicion. He left his old haunts, and after considerable effort on the part of the immigration officials in 1915 he was located in San Angelo, Texas, in the interior of the state and away from the main lines of travel. Previous to this time he had never testified concerning his status except in a

very brief and perfunctory sort of way, but in 1915 he was examined at considerable length by inspector Munster at El Paso, Texas, and we believe that this examination shows conclusively that he is an imposter. We need not review this evidence but if the department desires to pursue the matter further we call attention to the report of inspector Munster dated Jan. 5, 1915 (S. F. file 12020/1481).

Both of the claimants to the 1899 record were arrested on departmental warrants in 1915 and after taking considerable testimony and an exhaustive investigation, the Assistant Secretary of Labor Aug. 3, 1916, ordered both warrants canceled, stating: 'I regard the claim of both men as doubtful, but am not satisfied as to whether he is in the United States in violation of law'. We believe if the matters herein pointed out had been called to the attention of the Asst. Secretary at that time, he would have been satisfied beyond any reasonable doubt that the father of this applicant was the rightful claimant to the 1899 landing record.

The principal contention raised against his claim to the 1899 record was based upon a comparison of his photograph with the photographs on the 1899 affidavits of which enlarged copies were made and filed in the case. It is well known that comparison of photographs taken at different times with many years elapsing, and some of them years ago when photographs could scarcely be called a likeness of the person they were supposed to represent, furnish no infallible proof in determining the question of identity, and absolute reliance cannot be placed on such comparisons. It has often come to our notice that Chinese persons have considerable difficulty in identifying old photographs of themselves even where there is no dispute as to the identity.



The photograph on the 1899 affidavit may be that of the father of this applicant but from what happened to this 1899 record, as hereinbefore pointed out, it is a justifiable suspicion that the photographs may have been changed. Of course, a person engaged in a matter of this kind would spare no effort to make the document appear genuine and above suspicion and it would be difficult to detect, but at least two of the photographs in the 1899 record show indications that they may have been tampered with. The paper around the photographs is somewhat wrinkled and smeared up in an unusual way. This suspicion is further strengthened by the fact that an inspector in 1906 identified the photographs on the 1899 record as that of the father of this applicant, although we fail to note any particular resemblance between his later photographs and the ones now appearing on said affidavit.

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### Point of Law.

It is not disputed that the father of this applicant was admitted as a native born citizen of the United States in 1906. His status was adjudicated at that time. His status as a native was again adjudicated in 1912 when a return certificate was issued to him, and he was admitted as a citizen on his return to this country in 1915. Thereafter, in 1915, it developed that there were two claimants to the same landing record of 1899, the father of this applicant being one of them. Both claimants to this record were arrested on departmental warrants and after an exhaustive investigation, the Asst. Secretary of Labor August 3, 1916, canceled the warrants and in so doing stated



that he was not satisfied that either of the claimants were in the United States in violation of law. Thereafter, and on the 7th day of Sept. 1916, there was issued to the father of this applicant a certificate of identity No. 23775 showing that he was admitted as a native. This certificate among other things, sets forth that 'This is to certify that the person named and described on the reverse side hereof has been legally admitted to the United States as of the status indicated, whereof satisfactory proof has been submitted'.

This certificate stands as the last official action of the Department of Labor defining the status of the father of this applicant. It was issued shortly after the completion of an exhaustive investigation of his status and with full knowledge of all the facts charged against him. No new evidence has been offered to show that the decision then made was erroneous, and nothing has since developed to change his status. According to the solemn adjudication of the Department of Labor he is a citizen of the United States. So long as the father of this applicant is permitted to remain in the United States of the adjudicated status of a citizen, the executive officers of the government have no lawful power or authority to deny his children admission. The father of this applicant is either a citizen or he is not a citizen. He cannot be half native born citizen and half alien. He cannot be a native born citizen so far as his own personal status is concerned and an alien so far as his children are concerned. So far as the adjudications of the department are concerned he is a citizen and the executive officers of the government have no further jurisdiction to adjudicate his status, or review the former decision. That decision is final and binding upon the department until it

is reversed and set aside through judicial proceedings as provided by law. (Ng Fung Ho et al. v. White, 259 U. S. 276, decided May 29, 1922).

If the executive officers believe that the decision holding the father of this applicant to be a citizen is erroneous, the statute provides a remedy for proceeding against him. Where such valuable rights as citizenship are involved the matter should be approached in a fair and orderly manner and in strict conformity with law. The board of special inquiry appears to have proceeded on the erroneous theory that it is the duty of this applicant to establish anew and to their satisfaction that his father is a citizen, when under the conditions existing in this case, the burden is upon the government to overcome the prior adjudication and certificate of identity by evidence which the court considers competent. No such evidence nor any new evidence has been offered by the government. (Wong Yee Toon v. Stump, 147 C. C. A. 200-233 Fed. 194; Ng Fung Ho et al v. White C. C. A. 266 Fed. 765; Moy Nom 249 Fed. 772.)

Apparently, the immigration officials seek to shift that burden not onto the person whose citizenship is directly in issue, but onto a third person who would not even be a party to a proper and lawful proceeding to determine that question, and require him to establish in a collateral proceeding a fact which the department has already adjudicated in his favor and which, if still in doubt, should be determined through a direct, judicial proceeding instituted by the government against the party whose citizenship is questioned. Certainly the executive officers of the government would not be free from criticism if they were to assume the power to exclude this applicant through

and on failure to properly execute the law. The citizenship of this applicant is not in question. He is a minor, coming to his father in this country and the relationship is not disputed. His citizenship is fixed by statute to be that of his father. Of course, we are not here dealing with the citizenship of an applicant whose father has no adjudicated status and who is without the jurisdiction of the United States and cannot be proceeded against judicially.

The executive officers doubtless fully realize that it would be futile upon the facts appearing in the record, the prior adjudication, certificate of identity, and the statement of the Assistant Secretary of Labor that he was not satisfied that this man is in the United States in violation of law, to institute judicial proceedings against him, and the situation would be no more favorable to the government, if this appeal were dismissed and the applicant forced to resort to habeas corpus proceedings."

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### Argument.

The decision of the lower court states, first, that there was no unfairness in the hearing accorded the applicant for the reason that the record disclosed a serious discrepancy sufficient to raise a conflict in the evidence and that the question of fact involved was essentially one for the determination of the board of special inquiry and this prevented a review of the case by the court, and, secondly, that the applicant was not entitled to have his claim to citizenship determined by a

judicial trial because he was in legal contemplation without our borders seeking to get in as distinguished from one lawfully within our borders defending his legal right to remain, citing cases *White v. Chan Wy Sheung*, 270 Fed. 764; *Chin Yow v. U. S.*, 208 U. S. 8; *U. S. v. Ju Toy*, 198 U. S. 253; *Tang Tun v. Edsell*, 223 U. S. 673; and *Ng Fung Ho v. White*, 259 U. S. 276.

The discrepancy referred to relates to a photograph appearing on pages 5 and 10 of Exhibit "C" with that of the father of the applicant appearing on page 26, Exhibit "B". It is not contended that the applicant has been denied an opportunity to fully present his evidence but it is claimed that the evidence has not been fairly and impartially considered and for that reason a fair trial has been denied the applicant, and it was an abuse of discretion to deny him entry. This is forcibly illustrated by the fact that the denial is based solely on the question of a difference in photographs. The record and the photographs in question were before the Secretary of Labor in 1916 and he then stated that he could not say that the father of the applicant was in the country unlawfully. There is no doubt that he had in mind at that time the knowledge that many photographs in the Chinese records reposing in the files at Angel Island were changed surreptitiously and unlawfully by venal clerks working in conjunction with attorneys practicing before the



Department. At the investigation held at Angel Island in the years 1915 and 1916 it was disclosed that many photographs had been changed on the records and resulted in the return of indictments, prosecutions, and convictions for this violation of the law. This is a fact of public record. Not only were photographs changed on the records on file at the Angel Island immigration station, but they were also changed on the records on file in the office of the Clerk in the United States District Court. In a recent case tried in the United States District Court for the Northern District of California, First Division, No. 17657, Lee Foo and Lee Wing, it was proven conclusively that the photograph of the original claimant of the record was abstracted and a new photograph substituted therefor. The claimant of the record in that instance proved that he was the man referred to in the record and that there had been a substitution of photographs. Certainly, photographs are not the best evidence of the ownership of the record. There are many ways in which a photograph might become detached, lost or changed.

This point was recently discussed in the case of *Ex Parte Chin Yoke Hing* decided June 29, 1923, No. 2396, District Court D. Massachusetts, *Weekly Advance Sheets, Federal Reporter*, October 11, 1923, Vol. 291, No. 1, pages 274-277, the decision being in part as follows:

“Brewster, District Judge. Chin Yoke Hing has applied for admission as the son of



Chin Bing Len, who claims to be an American citizen. The relationship between the applicant and his alleged father has been established to the satisfaction of the authorities, but the citizenship of the father is questioned.

In 1900 two brothers, Chin Yuck Suey and Chin Bing Len, were arrested at Malone, N. Y., charged with unlawful entry into the United States, and after a hearing before Commissioner Paddock they were adjudged to be citizens of the United States. They were discharged and the commissioner issued to each a certificate of judgment. There was evidence tending to show that a photograph of the defendant, named therein, was attached to each certificate by the commissioner when it was issued. The father presents the certificate issued to Chin Bing Len. From an inspection of it, it is obvious that the attached photograph has been placed on the document since it was issued and there are indications that the photograph has been substituted for another. \* \* \*

I am of the opinion, therefore, that in this case, as in the earlier case of Chin Len the identity has been established by overwhelming and uncontradicted evidence, and that the excluding decision has no tangible basis on which to rest, and is therefore without authority of law. The fact that another photograph has been attached since the trial in 1900 would not necessarily be fatal. The original photograph may have become accidentally detached and another substituted in its place several years ago, in which case the testimony of Chin Bing Len would not be sufficiently wide of the mark to wholly discredit his evidence. The discrepancies in his statements can readily be accounted for by his condition at the time of the hearing. It does not seem to me that the presumption to which

Chin Bing Len is entitled under the decision above cited has been overcome by the inference which the department has seen fit to draw from these discrepancies. The petition for a writ of habeas corpus should be allowed, and the writ may issue."

In the case of Lee Foo and Lee Wing, *supra*, it developed from the evidence adduced that a substitution of photographs had been made. If, however, the applicants had been denied a hearing on the question of their father's citizenship they would have lost the valuable right that attaches to American citizenship.

It is very significant that when the father of this applicant applied for a return certificate in 1912 and filed affidavits with respect to his 1899 record, the inspector in charge at Angel Island stated that the "prior landing papers cannot be located". It is quite evident that these papers were removed from Angel Island. It was developed at the trial of the defendants charged with mutilation of public records at Angel Island that they would take the record from Angel Island to some San Francisco office and there make the substitution of pictures or whatever changes they desired in the records and later return the record to Angel Island. This was evidently done with the record in this case.

It is further very significant that the inspector who examined the father of the applicant on his

return from China May 31, 1906, stated as follows:

“I have compared the enclosed photograph with that on file in his previous landing and find them to be one and the same person,”

which clearly indicates that the record had been tampered with at some time subsequent to May, 1906.

In addition to that is the positive statement of a reputable lawyer, Henry C. Dibble, who made an affidavit at the time of the father's departure in 1904, Exhibit “B”, page 4, to the effect that the person in whose behalf it was made was the same Lee Hing who was #162 returning on the ss “Belgie” November, 1898, and who was the same person he represented at that time.

After the arrest of the father of this applicant and the other claimant of the record in the year 1915 and upon consideration of all the facts, the Secretary of Labor, the deciding authority, canceled both warrants of arrest and refused to issue warrants of deportation. After this order finally disposing of the matter by the Secretary of Labor, Lee Hing, the father of this petitioner, applied to the immigration authorities for the issuance of a certificate of identity, and certificate No. 23775 was issued to him on the 7th day of September, 1916. Under Rule 19 of the Departmental Regulations, the certificate is endorsed in part as follows:

“This is to certify that the person named and described on the reverse side hereof, has been regularly admitted to the United States as of the status indicated, whereof satisfactory proof has been submitted \* \* \*”

The concluding clause of Subdivision 5, Rule 19, is as follows:

“\* \* \* or if at any time it should develop that such certificate has been obtained by fraud, the certificate shall be taken up and forwarded to the Bureau of Immigration, with report of the circumstances, for decision whether it shall be canceled.”

No fraud has since been discovered and the certificate remains uncanceled. The Bureau of Immigration sought to have redecided by the present Secretary of Labor the same issue, upon identically the same evidence, that had been considered and decided differently by a former incumbent of that office. At the time the former Secretary of Labor considered the issue, he had before him all the evidence, testimony, records and exhibits bearing upon the question, and as hereinabove stated, he canceled the warrant of arrest against this Lee Hing, the father of this applicant, holding that he was unable to conclude that he was illegally within the United States, or that his claim of citizenship was falsely or fraudulently asserted. The favorable decision of Louis F. Post, Assistant Secretary of Labor, was dated August 3, 1916, and is found on page 166 of the deportation file in Exhibit “A”,



while the decision of Carl Robe White, the present Second Assistant Secretary of Labor, is found on page 46 of the admission file contained in Exhibit "A". The statutory authority for the decisions in deportation cases and appeals in admission cases rests upon the Secretary of Labor; the Bureau of Immigration is one of the bureaus in the Department of Labor. On page 46 of their memorandum in the admission file, exhibit "A", they state:

"On this point, however, the board's consideration and study of the evidence and exhibits would seem to confirm the prior expressed opinions of the Bureau of Immigration that the present alleged father has not shown to any reasonably convincing degree that he can be the original Lee Hing."

A similar situation was adjudicated last year in Massachusetts, in *re Wong Toy*, 278 Fed. 562. In that case the relationship of father and son was established, but the father was one of two rival claimants for the same prior landing habeas corpus record. The immigration authorities and the Secretary of labor decided adversely as to Wong Toy's father and denied his admission. The court held:

"It seems clear that the weight of the evidence on the question of the father's citizenship is in his favor. This was sufficient to entitle the petitioner to a finding in his favor on the point. But the immigration tribunals apparently exacted a higher degree of proof, unwarranted in law, and on that account refused admission. The memorandum of the Asst. Commissioner General says:



‘The very fact that experienced officers have reached different conclusions on the point at issue in the case, and that another party has already been admitted to the United States as being identical with the person represented by the photo on court record No. 9527 (the habeas corpus case), is evidence that there is substantial doubt as to the correctness of the claims now advanced by the present claimant. The burden of proof is by law placed upon the applicant, and it is manifest that it has not been sustained.’

In other words, the petitioner has been held to establish beyond “substantial doubt” that his father is a citizen. This was plain and fundamental error in law. It was sufficient if the necessary facts were established by a fair preponderance of the evidence.

Referring to a similar situation, the Supreme Court recently said: ‘It is better that many Chinese immigrants should be improperly admitted than that one naturalized citizen of the United States should be permanently excluded from this country’. *Kwock Jan Fat v. White*, 253 U. S. 454, 40 Sup. Ct. 566, 64 L. Ed. 1010.

On the evidence before the immigration tribunals the right of the applicant to admission was established. An order will be entered that the writ issue, and upon the return of it, unless the respondent desires to present further evidence, an order will be entered that the petitioner be discharged.”

That these prior adjudications and certificate should be given great weight has been repeatedly affirmed by court decisions. In the case of *Liu Hop Fong v. U. S.*, 209 U. S. 453, the court said: “certainly the certificate ought to be entitled to some weight”.

In the case of *U. S. v. Hom Lim*, 214 Fed. 456, at page 463, the court said:

“The decision of his right to enter was presumptively correct; and unless the United States shows persuasively to the contrary, the mere certificate of admission is sufficient.”

In *Ex Parte Wong Yee Toon*, 227 Fed 247, at page 251, the court said:

“Such a certificate imports at least *prima facie* verity. It cannot be treated as if it had never existed. Some evidence must be produced to justify the immigrant officials denying to it its usual and appropriate effect.”

And in the same case upon appeal to the Circuit Court of Appeals, *Wong Yee Toon v. Stemp*, 233 Fed. 194, at page 196 the court said:

“After the certificate is issued, it is our view that the burden is cast upon the government, in case a proceeding is instituted to attack it, to show by testimony which the law recognizes as evidence that it should be annulled before an order for deportation is warranted.”

In the case of *Lui Hip Chin v. Plummer*, 238 Fed. 763, this court held:

“But suspicion is not sufficient to justify deportation on the ground that admission was fraudulently obtained.”

From the foregoing it will be seen that the Secretary of Labor, notwithstanding this alleged discrepancy, appearing in the record, issued to Lee Hing, father of this applicant, the certificate affirm-

ing his citizenship. The court below in its decision cites the case of Chan Wy Sheung, 270 Fed. 764, as applicable to the instant case. There is a marked distinction to be drawn from a consideration of both cases. The evidence on which Chan Wy Sheung was excluded was discovered after the admission of Chan Young, and his two sons, father and brothers, respectively, of Chan Wy Sheung. One item of that evidence was that on June 2, 1899, Chan Young, having just arrived from China, filed at Victoria, B. C., a statement and declaration for registration as a laborer, in which he stated that he was born at Ding Boy, Sun Woy District China, and that his age was twenty-five years. Another item was a certified copy of the application for a certificate of residence made at San Francisco by Chin Wong, grandfather of the appellee, on April 10, 1894. Chin Wong therein deposed that he arrived in the United States at the port of San Francisco in May, 1876, and his application was accompanied by the affidavit of Chin Jow, who also said that Chin Wong arrived in the United States in May, 1876. Upon this evidence the Board of Special Inquiry found that Chan Young could not have been born here in 1875, and that in fact he was born in China and obtained admission to the United States by fraud. This evidence did not come to light until the application of Chan Wy Sheung for admission to the United States, and upon this after-discovered evidence, he was denied admission; whereas, in the instant case there has been no newly discovered evi-

dence to alter the previous finding and the record stands the same as when the Secretary of Labor considered it in 1916. It must also be noted that at the time Chan Wy Sheung applied for admission and appealed to the courts for relief, his father, Chan Young, was dead, and the father could not be proceeded against nor could there have been any proper adjudication of the case in court other than on the record evidence. This is not the situation that obtains in this case. The father is within the jurisdiction of the court and is entitled in all justice to have a judicial determination of his case.

The court also cites the case of *Ng Fung Ho v. White*, 259 U. S. 276. That was a proceeding which arose in this court and originally affected five Chinese, two of whom, Gin Sang Get and Gin Sang Mo, claimed American citizenship. Their plea was denied by this court, which decision under the same title being reported in 266 Fed. 769. These two boys had been landed as foreign-born sons of a native-born citizen through the immigration channels and by virtue of after-discovered evidence, the Department of Labor, on administrative proceedings, held that their original admission had been fraudulent and ordered them deported, notwithstanding they had been regularly admitted by the immigration authorities after full investigation and certificate of identity had been issued to them. This court held adversely to the appellants. *Certiorari* was applied for to the Supreme Court and it



was granted. After a full hearing the Supreme Court filed its decision herein referred to on May 29, 1922, the decision being in part as follows:

“\* \* \* Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status. *Ex Parte Reed*, 100 U. S. 13; *in re Grimley*, 137 U. S. 147; *in re Morrissey*, 137 U. S. 157; *Johnson v. Syre*, 158 U. S. 109. Compare *Ex Parte Crow Dog*, 109 U. S. 556. If the jurisdiction of the Department of Labor may not be tested in the courts by means of the writ of habeas corpus, when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then obviously deportation of a resident may follow upon a purely executive order whatever his race or place of birth. For where there is jurisdiction a finding of fact by the executive department is conclusive; *United States v. Ju Toy*, 198 U. S. 253; and courts have no power to interfere unless there was either denial of a fair hearing, *Chin Yow v. United States*, 208 U. S. 8, or the finding was not supported by evidence; *American School of Magnetic Healing v. McAnnulty*, 187 U. S., or there was an application of an erroneous rule of law, *Gegiow v. Uhl*, 239 U. S. 3. To deport one who so claims to be a citizen, obviously deprives him of liberty, as was pointed out in *Chin Yow v. United States*, 208 U. S. 8, 13. It may result also in loss of both property and life, or of all that makes life worth living. Against danger of such deprivation without the



sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court. Compare *United States v. Woo Jan*, 245 U. S. 552, 556; *White v. Chin Fong*, 253 U. S. 90, 93.

It follows that Gin Sang Get and Gin Sang Mo are entitled to a judicial determination of their claims that they are citizens of the United States, but it does not follow that they should be discharged. The practice indicated in *Chin Yow v. United States*, *supra*, and approved in *Kwock Jan Fat v. White*, 253 U. S. 454, 465, should be pursued. Therefore, as to Gin Sang Get and Gin Sang Mo, the judgment of the Circuit Court of Appeals is reversed and the cause remanded to the District Court for trial in that court of the question of citizenship and for further proceedings in conformity with this opinion. As to Ng Fung Ho and Ng Yuen Shew the judgment of the Circuit Court of Appeals is affirmed."

The court below in commenting upon this decision draws the distinction between a person who is within the borders of our country resisting an attack upon his right of citizenship and one who is theoretically without our borders seeking admission. Here, we have the situation of a father within the jurisdiction of the courts, presenting a claim of citizenship that is not frivolous but based upon a substantial claim, to-wit, a certificate issued by the Department of Labor affirming his citizenship, and the applicant who is conceded to be his natural son and as such is a citizen of the United States; yet that son

is denied entry because of the attack on the father's citizenship and the father denied the right to have his citizenship judicially determined. The father, according to the decision, has no remedy. Nine years have elapsed since he was given this certificate and no action was ever instituted against him or his claims. He cannot institute any proceeding himself as there is no way he can bring the matter into a court of the United States except by this method of Habeas Corpus. He is therefore in the position of one who bears the credentials of citizenship and yet deprived of his constitutional right to bring his children to his home, and the children are deprived of their citizenship. In the petition for the Writ of Habeas Corpus it is alleged that the immigration officers were influenced in their decision by the fact that the applicant is of the Chinese race. Can it be said this is not the truth? It would be hard to conceive of a white man being treated in the same manner. That the government recognizes the injustice of this situation is apparent from the decision rendered in the case and to be found on page 46 of the admission record attached to Exhibit A, which reads as follows (*italics volunteered*):

“In the concluding paragraph of his brief, local counsel in effect challenges the Department to proceed judicially against the alleged father, stating that it is doubtless realized that it would be futile upon the facts appearing in the record, the prior affidavits, certificate of identity and the statement of the former Assistant Secretary of Labor that he was not satisfied that

the alleged father in this case is in the United States in violation of law, to institute such action. The Board, in considering this reason and challenge, *feels that in justice to the Government and to the applicant*, the course referred to by counsel should be taken, and that the Commissioner at San Francisco should be directed to institute proceedings before a United States Commissioner or Court, charging an unlawful residence within the country. By this means, the question of his nativity will, of course, be finally and legally determined."

There are no separate findings or conclusions of the present Secretary of Labor in this case; all that he has done in the premises is to make the following endorsement at the bottom of the Bureau's memorandum:

"so ordered: (signed) ROBE CARL WHITE, Second Assistant Secretary."

From the foregoing it is apparent that the Secretary admits that in justice to Lee Soo and his father as well as in justice to the Government, the issue of citizenship, in view of the circumstances in this case, should be decided in court. The recommendation concludes:

"\* \* \* The Board's final recommendation now, is that this appeal be dismissed, anticipating that the matter would then be thrown into court, and that also, the Commissioner at San Francisco be instructed to have a warrant sworn out for the alleged father before some United States Commissioner \* \* \*."

It might be appropriate to here call attention to the case of Tsoi Sim v. United States, U. S. C. C. A. 9th Cir., May 5, 1902, 116 Fed. Rep. page 920, in which it was stated as follows:

“One of the cardinal rules as to the interpretation of the statutes is that they should receive a sensible construction. ‘All laws should receive a sensible construction’. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of law should prevail over the letter.”

We submit that to avoid an absurdity, the decision of the lower court should be reversed with direction to issue the writ as prayed for so that this applicant may have a judicial trial as to his citizenship.

Dated, San Francisco,  
November 7, 1923.

Respectfully submitted,

JOSEPH P. FALLON,

*Attorney for Appellant.*





IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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LEE HING, also known as LEE GOOD  
MING,

*Appellant,*

vs.

JOHN D. NAGLE, as Commissioner of  
Immigration, Port of San Francisco,

*Appellee.*

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## APPELLEE'S REPLY BRIEF

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JOHN T. WILLIAMS,  
*United States Attorney.*

ALMA M. MYERS,  
*Asst. United States Attorney.*  
*Attorneys for Appellee.*



No. 4096

IN THE

# United States Circuit Court of Appeals

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## APPELLEE'S REPLY BRIEF

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### STATEMENT OF FACTS.

We adopt the statement of facts preceding the opinion rendered by the Honorable United States District Judge Van Fleet in the above-entitled case; they are as follows:

“Lee Soo, admittedly born in China, applied for admission at the port of San Francisco, as a son of one Lee Hing, also known as Lee Good Ming, alleged to be a native-born citizen of the United States, in the right given such an applicant by Sec. 1993, R. S. His application was

denied by the Immigration Authorities and upon appeal to the Secretary of Labor the decision of the Board of Special Inquiry was affirmed and the appeal dismissed. Thereupon the present petition for *habeas corpus* to release the applicant from custody by the Immigration Authorities, in which he is held, was filed in his behalf. The petition is very general, consisting largely of allegations of conclusions, but by stipulation in open court the entire immigration records and files involved in the application were introduced as an amendment and supplement to the petition to which petition, as thus amended, the Government has demurred generally upon the ground that it presents no case in law or fact warranting the issuance of the writ.

The finding against the petitioner was based upon the conclusion reached by the Immigration Authorities that petitioner had failed to sustain the burden resting upon him of establishing the facts which would fix his status as that of a citizen of the United States under Section 1993 aforesaid; that is, while the Government did not seek to controvert the alleged fact that petitioner was the son of the Lee Hing above described the conclusion was reached that the evidence was insufficient to show that the latter was as claimed a native-born citizen of the United States and that consequently the rights assumed by petitioner as resulting from his relationship to the latter must fall to the ground. This conclusion resulted from the disclosure of the immigration records, made a part of the petition, that petitioner's alleged father had gotten his lines crossed and tangled up with

another Lee Hing, also claiming to be a native-born citizen, in a manner to render it doubtful which of the two, if either, was such citizen, the claim of both being based partly at least on the same records.

The facts briefly stated are these: Petitioner's alleged father, on October 5, 1904, made an affidavit (XB, P5) setting forth that he was born in San Francisco in 1876 and was thereafter taken to China by his father in 1882, where he remained until 1899, when he returned to the United States on the SS. 'Belgie,' holding ticket No. 162, and on March 2, 1899, was duly landed as a native by the then Collector of Customs. This affidavit bore an endorsement showing that the affiant thereafter, on October 13, 1904, departed from the United States on the SS. 'Mongolia,' and attached to the record was an affidavit of one Henry C. Dibble, an attorney (XB, P4), to the effect that the person in whose behalf it was made was the same Lee Hing, who was No. 162, returning on SS. 'Belgie,' November, 1898—who affiant claims he represented at that time. This Lee Hing returned to this country on the SS. 'Manchuria' 3, 1906 (XB, P3), and was landed the following day by the then Commissioner. On this latter occasion one Inspector Gassaway, on May 13, 1906, made a report to the inspector in charge of the Chinese Bureau that: 'In re case of Lee Hing, No. 64—"Manchuria," May 13, 1906. I have compared the enclosed photograph with that in file in his previous landing and find them to be one and the same person.' It appears, however, from a comparison of the photograph



of this Lee Hing, appearing at page 5 of Exhibit 'B,' that the photograph attached to pages 5 and 12 of Exhibit 'C' (being the photograph of the person previously admitted as No. 162 on the SS. 'Belgie') was quite evidently that of a wholly different person. It further appeared that Lee Hing, the alleged father of the petitioner, subsequently made an application on October 21, 1912 (XB, P24), to the Commissioner of Immigration at Boston, Massachusetts, for a Native's Return Certificate, Form 430, which was thereafter granted by the Commissioner of Immigration at Seattle, Washington, November 8, 1912, and that he departed from the latter port on the SS. 'Minnesota,' December 16, 1912; that he thereafter returned through the port of San Francisco on the SS. 'Mongolia,' June 1, 1915, and was admitted as a returning citizen (XB, P25), his photograph as he appeared at the latter date, appearing at page 26, Exhibit 'B.' But the record also discloses that on April 1, 1912, another Lee Hing (known also as Lee Ging Sing) made an application to the Commissioner at San Francisco for a Native's Return Certificate, Form 430 (XC, P35), which was granted and he departed for China on the SS. 'Mongolia,' April 10, 1912. He returned on the SS. 'Mongolia' April 22, 1913, and was duly admitted on his certificate, as a native (XC, P36). This latter Lee Hing claimed to be the Lee Hing who had been admitted as No. 162 on the 'Belgie,' November, 1918; and comparison of the photograph appearing on pages 5 and 12 of Exhibit 'C' with that appearing on the application for a return certificate, (XC, P35), and the photograph ap-

pearing at page 37 of the same record tends strongly to confirm the correctness of his claim that he was the Lee Hing who was previously admitted as a native on March 2, 1899, by the then Collector of Customs.

From these facts it was deduced and found by the Board of Special Inquiry that this last-mentioned record of 1898 did not refer to the father of the petitioner and it was accordingly found by them that the record did not sustain petitioner's contention as to the fact of his father's citizenship and the judgment of exclusion followed." (Transcript, P. 14-18.)

Other facts necessary to consider are as follows:

Lee Hing identifies both photographs contained in the 1899 record found in Ex. C, p. 5 and 12 (enlarged photograph No. 1), Deportation file Ex. A, p. 13 and p. 80, and also the photograph accompanying affidavit of October 5, 1904, found in Ex. B, p. 5, enlarged photograph No. 3, as true photographs of himself. Deportation file Ex. A, p. 14 and 80. This identification, therefore, precludes all possible claim by appellant that the photographs in the record of the Lee Hing landed from the steamer *Belgie* in 1899, were altered or changed. It is also apparent from an examination of the photographs alleged to be photographs of the same person taken five years apart that under no possibility could the two photographs represent one and the same person, and the claim of the applicant's father, Lee Hing, to the 1898 record by his own testimony falls to the ground.

An additional circumstance which from the testimony of Lee Hing disproves his claim to the 1898 record is found in this that Lee Hing claims to have been married in 1898, Deportation file Ex. A, p. 80, and claims to have been at that time the father of an infant boy, Admission file Ex. A, p. 17; whereas the 1898 applicant testified at the time of his admission that he was not married. Ex. E, p. 16 and Ex. C, p. 25. The present Lee Hing on being questioned with reference to the statement last above referred to, found in the 1898 record, replied: "I was married then. I don't know what I said before." Deportation file Ex. A, p. 81.

A further material discrepancy is found in the fact that the Lee Hing landed in 1898 testified that his father was somewhere in the interior of the United States. Ex. C, p. 24, whereas the present Lee Hing claims that his father died in China in K.S. 17 or 18 (which would be prior to the arrival of Lee Hing in 1898, K.S. 24) Deportation file Ex. A, p. 79.

Much reliance is placed upon the finding of Assistant Secretary of Labor Post in the deportation case against Lee Hing, the father of claimant for admission, which finding is in the following language:

“DEPARTMENT OF LABOR  
Office of the Assistant Secretary  
Washington.

53947-22

August 3, 1916.

In re LEE YOOK MING and LEE GEN SING, both claiming to be Lee Hing, who was admitted as a citizen in 1898-99.

Memorandum for THE COMMISSIONER  
GENERAL:

Upon review of all the Bureau and Departmental memoranda in these cases, I regard the claims of both men as doubtful, but am not satisfied as to either that he is in the United States in violation of law. The Bureau's recommendation as to LEE GEN SING in Second Supplemental Memoranda (July 28, 1916), is therefore approved, but the recommendation as to LEE YOOK MING is disapproved.

Although the latter's resemblance to Lee Hing's photo of 1898-99 (No. 1 of the enlarged series) is less as to the ear than LEE GEN SING'S, yet he was identified in 1904 by the attorney for Lee Hing as that identical person. Both defendants cannot be that person, and it is probable that neither is. *Therefore this decision is intended not to bear upon their rights of citizenship, but only upon the disposition of the warrants now outstanding.*

*Both warrants are cancelled without prejudice to new warrant proceedings upon satisfactory supplemental proof, nor to exclusion decisions upon the application of either or of any*



*person claiming under either, to enter the country at any port at any time.*

LOUIS F. POST,  
Assistant Secretary."

Deportation file, Ex. A, p. 166..

It appears, therefore, that the finding was expressly not an adjudication of the present Lee Hing's right to the 1899 record and was not an affirmation of his citizenship status, as counsel in their brief state. Appellant's brief, pages 9, 17.

As a matter of fact, all the officials passing upon the question of whether or not this Lee Hing was the Lee Hing admitted in 1899, determined the question adversely to him and likewise found unfavorably upon his claim of citizenship. See Boyce's decision, deportation file, Ex. A, p. 1; Commissioner Backus' report, deportation file, Ex. A, p. 15-18; Report for the Commissioner General by A. Warner Parker, deportation file, Ex. A, 21-22; Assistant Commissioner General Hampton's report, deportation file Ex. A, p. 24; Commissioner White's report, deportation file, Ex. A, p. 114 to 117; particularly p. 115 and 114; Assistant Commissioner General's report, deportation file, Ex. A, p. 118 to 120; A. Warner Parker's report for the Commissioner General, deportation file, Ex. A, 163-165; Inspector A. S. Hemstreet's report under date of October 27, 1922; admission file Ex. A, p. 19; Board of Special Inquiry report, admission file Ex. A, 24-26; Commissioner White's report, admission file Ex. A, p.



34; Secretary of Labor's decision admission file Ex. A, 45-49.

Subsequent to the date of the findings of Assistant Secretary Post hereinbefore set out, the present Lee Hing obtained a certificate of identity similar to the certificate appearing in Exhibit Immigration File, subject Lee Som, p. 1. Note that on the face thereof appears after the name, age, occupation, the words "Admitted as" after which is to be filled in the status under which the applicant obtained admission, the immigration file number of his record of admission, the ship from which he landed and the date of his admission. These certificates are issued not by the Secretary of Labor, but by the local office in conformity with Rule 19, Immigration Rules, for the purpose of affording proper and efficient means of identification to Chinese persons, or persons of Chinese descent admitted to the United States.

The certificate of identity puts into the possession of a Chinese person a ready means of connecting himself with the records at the port of admission and is really merely an extension of the landing record. An application therefor may be made at any time after entry, and the fact that the certificate was not issued until a long time thereafter does not indicate that a determination has been made in the case as of the date of issuance; upon a request therefor no investigation is made into the merits of the case and the certificate has no further significance than the copy of the landing record would

have, had the same been handed to the applicant immediately following his admission.

Rule 19 of Rules governing the admission of Chinese is entitled "Certificate of Identity," and subdivision 8 thereof "Value of the Certificate." The language of Subdivision 8 is as follows:

"The certificate of identity when issued to Chinese of the exempt classes *is granted solely for the protection of such Chinese while residing in the United States* and retaining an exempt status, and therefore *will not be accepted as satisfactory evidence in any other connection.* For example, a domiciled exempt holding such certificate of identity will not be excused from a compliance with the terms of subdivision 11 of Rule 15. The certificate may be accepted, however, as evidence of a former admission as of an exempt status and be given such cumulative value as the circumstances of a case justify. When issued to a person of Chinese descent as a United States citizen by birth, the certificate will be accepted at all times thereafter as evidence of the holder's right *to reside in the United States*; extreme caution is to be observed, however, in determining whether the certificate is genuine and in the hands of the person to whom issued; provided, always, that fraud has not been perpetrated upon the Government in securing its issuance."

## ARGUMENT.

Appellant's contention revolves itself into this, firstly, that the burden is upon the Government to overcome the effect of the prior admissions of and certificate of identity issued to Lee Hing by evidence which the Court considers competent, and as no new evidence has been offered by the Government that the decision of the Immigration authorities upheld by the lower Court denying applicant admission on the ground that his father is not a citizen, is an abuse of discretion; secondly, that in any event applicant is entitled to have the question of his citizenship determined judicially, rather than by the executive authorities.

Considering these questions in their order, we propose to show, first, that applicant admittedly being a native of China, seeking admission to the United States for the first time, the burden was upon the applicant to establish his right to admission, to-wit, his status as a citizen of the United States; that the previous admissions of his father as a citizen are not *res adjudicata* and are not determinative of the question of his father's citizenship; that the question of Lee Soan's citizenship is properly determinable by the Immigration authorities.

## PROPOSITION I.

THE FINDING OF THE IMMIGRATION AUTHORITIES THAT LEE SOO WAS NOT A CITIZEN AND WAS, THEREFORE, NOT ENTITLED TO ADMISSION AS THE SON OF LEE HING, A LABORER, IS SUSTAINED BY THE EVIDENCE.

The evidence presents an issue of fact as to whether or not the present Lee Hing was the Lee Hing landed in 1899; the answer to this question depends upon whether or not the photographs of the 1899 claimant found in Ex. C at pages 5 and 12 claimed by this Lee Hing to be true likenesses of himself are in fact such. Here is involved a question of identity which is purely a question of fact, which is a question for determination by the Immigration authorities. *Mon Singh vs. White*, 274 Fed. 513. *Chan Tse Ching vs. United States*, 189 Fed. 412. Comparing these photographs with the photographs found in Ex. B taken in the years 1904 and 1915, which are admittedly true photographs of the present Lee Hing, it was found by the Immigration authorities and by His Honor, Judge Van Fleet, that the present Lee Hing was not the person whose photograph appears in the 1899 record, and by a glance of the eye it is apparent to anyone that such finding is correct.

In addition to the failure to establish identification from the photographs in the 1899 records, there are as heretofore pointed out, serious conflicts between the testimony of the present Lee Hing and



the testimony given by the Lee Hing landed in 1899, namely as to the fact of marriage in 1898; as to whether the father was dead or alive in 1898 and the fact that the present Lee Hing claimed a son born prior to 1898.

The case in re Wong Toi, 278 Fed. 562, cited by counsel for appellant, page 18 of his brief, was an exclusion case as distinguished from the deportation of a resident Chinese, in which the question involved was, as here, the citizenship of the applicant, and this in turn depended upon the citizenship of his father. The father in that case claimed an habeas corpus record, whereas in this case no habeas corpus or court record of any kind is involved. In that case it is to be noted that the decisions of the Inspectors, the Board and the Department other than the Secretary of Labor were to the effect that the father of the applicant was the one entitled to the record in question, which is not the situation in the instant case. The Court there held that the Immigration Tribunal apparently exacted a higher degree of proof unwarranted in law; that the applicant had been required to establish beyond substantial doubt that his father is a citizen. This was held to be error. *"It was sufficient if the necessary facts were established, by a fair preponderance of evidence."* That burden was met in that case and the District Court admitted the applicant. The necessary facts in the instant case were not established by a fair preponderance of evidence, and, therefore, the Court below sustained the findings of the Secretary of Labor.



It is contended by counsel that the immigration authorities having twice landed Lee Hing as a citizen and having issued a "certificate of identity" in conformity with this finding, are now estopped from attacking this finding.

It is to be borne in mind that the only adjudication by the Secretary of Labor in the case of Lee Hing was in a deportation proceeding as distinguished from an admission proceeding, such as this is, and which adjudication expressly refrained from deciding the question of Lee Hing's citizenship, and more particularly the right or rights of any person or persons claiming thereunder; that the certificate of identity issued to Lee Hing, the father of the applicant for admission, is not an adjudication and has no greater force or effect than ~~the~~ the admission of Lee Hing at the time of his entry into the United States ~~has~~.

The law is well settled that the decisions of administrative officers are not *res adjudicata* in a technical sense. This has been held in *Ex parte Stancampino*, 161 Fed. 164; *Ex Parte Chin Own*, 239 Fed. 391; *Pearson vs. Williams*, 202 U. S. 281.

The decisions of executive officers not being *res adjudicata* it must follow that the certificates issued by them evidencing their findings are not the principle of *setoppel*, if any exists, rests in the finding itself and not in the certificate.

In the case of *Lew Quen Wo vs. United States*, 184 Fed. 685, this Court held:

“There is no statutory provision that the decision, if favorable to the applicant for admission, shall be final. The decisions have been to the contrary. *United States vs. Lau Sun Ho* (D.C.) 85 Fed. 422, and cases there cited; *Mar Bing Guey vs. United States* (D.C.) 97 Fed. 576.”

The other cases cited by counsel,

*Liu Hop Fong vs. U. S.*, 209 U. S. 453

*U. S. vs. Hom Lim*, 214 Fed. 456

*Ex Parte Wong Yee Toon*, 227 Fed. 247

*Wong Tee Toon vs. Stemp*, 233 Fed. 194

*Lui Hip Chin vs. Plummer*, 238 Fed. 763

were all cases in which were involved Section 6 certificates as distinguished from certificates of identity with which we are concerned, and each and all were deportation cases as distinguished from exclusion cases. The distinction between exclusion cases and deportation cases will be hereinafter discussed. The distinction between such certificates and the one here involved is sometimes lost sight of. In *ex parte Wong Yee Toon*, 227 Fed. 247, at page 251 thereof, the distinction is pointed out in the following language:

“In *Pearson vs. Williams*, 202 U. S. 281, the same board of special inquiry which admitted the immigrant a month later ordered his deportation. *Nor is such act of admission equivalent to a certificate of status or residence issued in accordance with the provisions of some treaty or statute.* Such a certificate imports at least

*prima facie* verity. It cannot be treated as if it had never existed. Some evidence must be produced to justify the immigrant officials denying to it its usual and appropriate effect. *Liu Hop Fong vs. United States*, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888."

In the case of *Lui Hit Chu vs. Plummer*, 238 Fed. p. 763, his Honor, Judge Gilbert refers to a merchant certificate (Section 6 certificate) as being made in conformity with the treaty and recognizes that these certificates are entitled to weight as evidence.

In the case of *Lew Suen Wo vs. United States*, 184 Fed. 685, the distinction is noted in the language following:

"Nor is the certificate of identity which was issued to the appellant after the commissioner of immigration had passed upon his right to admission, an instrument of such effect as to stand in the way of his deportation. It is not like the certificate of residence provided for in the act of 1893, which defined the method by which Chinese in the United States might obtain evidence of their right to remain. Those certificates were registered as the solemn act of the government, and were intended to furnish evidence of the right of the holders thereof to remain in the United States, and to be conclusive evidence of that right, and they are not subject to collateral attack. In *re See Ho How* (D.C.) 101 Fed. 115; in *re Tom Hon* (D.C.) 149 Fed. 842."

The certificate of identity, however, is given not under a treaty and not under the law of 1893 passed to comply with the treaty with China relating to the rights of persons then resident here upon obtaining a certificate of residence, but is issued by the Commissioner at the port of entry for the purpose of identifying the applicant with his landing record and to furnish him a ready means of identity for his convenience and for the convenience of the Immigration authorities. As was said in *Lou Hop vs. U. S.*, 257 Fed. 489, in the note at page 492 thereof, "That certificate (the certificate of identity) unlike the certificate issued by the Viceroy and visced by the American Consul General is, as we have seen, a Departmental Regulation and designed as a measure of convenience. (*Sibray vs. U. S.*, 227 Fed. p. 4) and, of course, can be effective only so far as is within the law, citing:

*U. S. vs. Lou Chu*, 214 Fed. 463.

*In re Tam Chung*, 223 Fed. 801."

A case that disposes of the contentions of appellant here respecting the weight to be given the certificate and the significance of prior admissions of the father, Lee Hing, is ~~found~~ in *Doo Fook vs. U. S.*, 272 Fed. p. 860, a Circuit Court of Appeals case in which his Honor, Judge Morrow wrote the opinion. That was a deportation case and there the appellant had been admitted as a native, and, thereafter his deportation was sought as being an alien unlawfully in the country. No additional evidence was introduced by the Government to that which



had been introduced at the hearing before the officials who admitted him, and notwithstanding the fact that as a matter of law it was there held that the burden was upon the Government to attack the right of a resident Chinese person who had been readmitted as a native born citizen to remain in the country, it was there held that that does not mean that the Government must in any event introduce evidence to show that the defendant is not a citizen of the United States. The attack may be made upon the evidence produced on behalf of the defendant on the hearing and if that evidence is contradictory or insufficient to show that the defendant was born in the United States the Court would be justified in so holding, notwithstanding the previous action of the Executive Department of the Government in giving him a landing.

A case, similar to the essential principles involved, was that of *White vs. Chan Wy Sheung*, 270 Fed. 764, in which this Court said:

“It remains to be considered whether the judgment of the court below is sustainable on the ground on which it was based, that the department should be bound by its own prior adjudication in admitting the appellee’s father and his two brothers as citizens of the United States. The board of immigration is not a court. It is an instrument of the executive power, and its decisions do not in a technical sense constitute *res adjudicata*, (*Pearson vs. Williams*, 202 U. S. 281, 285, 26 Sup. Ct. 608; 50 L. Ed. 1029), and the department is not



bound by its prior decisions admitting aliens to the United States. (*Haw Moy v. North*, 133 Fed. 89, 105 C. C. A. 381; *Lew Quen Wo vs. United States*, 184 Fed. 685; 106 C. C. A. 639; *Li Sing vs. United States*, 180 U. S. 486; 21 Sup. Ct. 449, 45 L. Ed. 634). We are unable to see how any principle of estoppel can apply in favor of the appellee from the fact that his father and two brothers were admitted to the United States as citizens thereof. The appellee was in no sense a party to the proceedings in which those decisions were made, and he was not represented therein. His right to enter depends solely upon the question whether his father was born in the United States. On his application for admission that question was determined adversely to him."

It is therefore respectfully urged that the fact that Lee Hing was twice admitted as a citizen and obtained a certificate of identity as one admitted as a citizen, that such facts did not estop the Immigration authorities in the case of Lee Soo (not a party to the prior hearings) from finding that Lee Hing was not in fact a citizen; nor did the existence of the facts above narrated relieve Lee Soo from the burden of establishing his claim of citizenship.

So much for the evidence; as stated by the District Judge, substantial conflict existed on an essential feature of the applicant's case, and this being so, the matter was one for the determination of the Board and their finding was not subject to review by the Court.

~~Lee Hing~~ *vs. United States*, 142 U. S. 651.

*Kwock Jan Fat vs. White*, 253 U. S. 456.

From the entire record before the Immigration authorities, it appears that Lee Hing, the father of the applicant, is not the Lee Hing known as No. 162 Steamer Belgic 1898, landed in 1899, and no other proof being offered to sustain the claim of citizenship, (it being conceded that applicant was given an opportunity to fully present his evidence, (appellant's brief, p. 12) the finding of the Immigration authorities that the evidence was insufficient to sustain the claim of Lee Soo to citizenship by virtue of his father's claim thereto, was fully supported by the evidence and cannot be judicially attacked.

## PROPOSITION II.

The question of Lee Soo's citizenship is properly determinable by the Immigration authorities.

On this question the decisions of the courts are all one way. It has been settled that the determination of all questions of fact *relating to the right of entry* of Chinese applying therefor (including a claim of citizenship) has been vested by Congress in the Immigration authorities.

In the case of the United States vs. Ju Toy, 198 U. S. 253, the Supreme Court said:

“It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed—as well when it is citizenship as when it is domicile and the belonging to a class excepted from the exclusion acts.”

While the statutes of the United States limit the determination of the immigration officers to the case of aliens seeking entry, as was said in the case of *United States vs. Sing Tuck*, 194 U. S. 161, "in order to act at all the executive officials must decide the question of citizenship."

Again referring to the *Ju Toy* case (*supra*) it was said:

"The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws."

This doctrine is confirmed in the case of *Tang Tun vs. Edsell*, 223 U. S. 673.

To support his contention counsel depends on the decision of the Supreme Court in the case of *Ng Fung Ho et al. vs. White*, 259 U. S. 276.

His Honor, Judge Van Fleet, in his opinion in the instant case, found on this point as follows:

"Nor does the fact that the petitioner's alleged right of admission is based upon his claim

of citizenship entitle him, in such an instance as the present, to a judicial determination of that claim before he may be deported. While one lawfully within the United States, claiming to be a citizen thereof may not competently be deprived of his right to be here by mere executive order, but is entitled to have the question of his asserted citizenship judicially determined before he may be removed (*Ng Fung Ho vs. White*, 259 U. S. 276) no such right attaches to one who, like the petitioner is seeking admission to the country for the first time and the fact that his claim to admission may be based upon the asserted right of citizenship does not bring him within the category of those entitled to invoke the jurisdiction of our courts for the determination of that question. (*United States vs. Ju Toy*, 198 U. S. 253; *Tang Tun vs. Edsell*, 223 U. S. 673). *The distinction is between the case of one lawfully within our borders defending his asserted right to remain, and one who, like petitioner, is in legal contemplation without our borders seeking to get in.*" Ex parte Lee Soo, 291 Fed. 271.)

The *Ng Fung Ho* decision (*supra*), adverting to the security of judicial over administrative proceedings, held that a Chinese within the United States who sets up a claim to citizenship and "makes a showing that his claim is not frivolous," is entitled to a judicial hearing, but the decision makes clear the distinction between the case of resident Chinese and one seeking entry, as follows:

"If, at the time of the arrest, they had been,



in legal contemplation, without the borders of the United States, seeking entry the mere fact that they claim to be citizens would not have entitled them under the Constitution to a judicial hearing.”

Further enunciation of this doctrine is to be found in the recent case of *Soo Hoo vs. Tod*, Commissioner of Immigration, 293 Fed. 689; also case of *White vs. Chan Wy Sheung*, *supra*.

In the case of *Fong Yuen Ting vs. United States*, 149 U. S. 711, the Supreme Court said:

“The constitutional guaranty secured to a person while within the jurisdiction of the United States, whether they be resident aliens or citizens, has no application when the alien has voluntarily gone from the country. The constitutional guaranties are not extended to those outside of the jurisdiction of the United States.”

Thus from the well settled law in this matter, it is apparent that the determination of Lee Soo's citizenship is within the jurisdiction of the immigration authorities.

Concluding, therefore, we respectfully submit that the Immigration authorities had jurisdiction to determine the citizenship of Lee Soo, a person of Chinese birth seeking admission to this country; that their finding that Lee Soo is an alien finds adequate support in the evidence. As these are the only points urged on this appeal, it is respectfully



submitted that the appeal is without merit and the judgment of the lower Court should be sustained.

Respectfully submitted,

JOHN T. WILLIAMS,  
*United States Attorney.*

ALMA M. MYERS,  
*Asst. United States Attorney.*

Dated: January 8, 1924.

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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STU SAY,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration,  
Port of San Francisco,

Appellee.

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Transcript of Record.

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Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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SIU SAY,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration,  
Port of San Francisco,

Appellee.

---

**Transcript of Record.**

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Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Assignment of Errors .....	12
Certificate of Clerk U. S. District Court to Transcript on Appeal .....	16
Citation on Appeal.....	17
Demurrer to Petition for Writ of Habeas Cor- pus .....	8
Names of Attorneys of Record .....	1
Notice of Appeal .....	10
Order Allowing Appeal .....	14
Order Denying Petition for Writ, etc. ....	9
Order to Show Cause .....	7
Petition for Appeal .....	11
Petition for Writ of Habeas Corpus.....	2
Praecipe for Transcript of Record.....	1
Stipulation and Order Respecting Withdrawal of Immigration Record.....	15



### **Names of Attorneys of Record.**

For Petitioner and Appellant:

JOSEPH P. FALLON, Esq.,  
San Francisco, Cal.

For Respondent and Appellee:

UNITED STATES ATTORNEY,  
San Francisco, Cal.

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In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 17,945.

In the Matter of SIU MOOY CHEW, on Habeas Corpus.

### **Praeipice for Transcript of Record.**

To the Clerk of said Court:

Sir: Please make copies of the following papers to be used in preparing transcript on appeal:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Demurrer to petition.
4. Minute order regarding immigration record.
5. Judgment and order dismissing order to show cause and denying petition for writ.
6. Notice of appeal.
7. Petition for appeal.
8. Assignment of errors.
9. Order allowing appeal.

10. Stipulation and order regarding immigration record.
11. Clerk's certificate.
12. Citation on appeal—original and copy.

JOSEPH P. FALLON,  
Attorney for Petitioner.

[Endorsed]: Filed Sep. 5, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.  
[1\*]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 17,945.

In the Matter of SIU MOOY CHEW,  
#22058/4-26 Ex. SS. "Pres. Cleveland,"  
April 19, 1923; Merchant's Son; on Habeas  
Corpus.

**Petition for Writ of Habeas Corpus.**

To the Honorable, the Southern Division of the  
United States District Court, for the Northern  
District of California, Second Division:

The petition of Siu Say respectfully shows:

That your petitioner is a lawfully domiciled Chinese merchant and a resident of the State and Northern District of California; that Siu Mooy Chew, the detained person on whose behalf this petition is made, is the lawful minor son of your petitioner, who is a lawfully domiciled merchant

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\*Page-number appearing at foot of page of original certified Transcript of Record.

in the United States, and as such is entitled to enter the United States; that the said Siu Mooy Chew, hereinafter in the petition referred to as the "detained," is unlawfully imprisoned, detained, confined and restrained of his liberty by John D. Nagle, Commissioner of Immigration for the Port of San Francisco, at the Immigration Station at Angel Island, county of Marin, State and Northern District of California; that said imprisonment, detention, confinement and restraint are illegal, and the illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner that the said detained is a Chinese person and alien not subject or entitled to admission into the United States under the terms and provisions of the Acts of Congress of May 6, 1882, July 4, 1884, November 3, 1893, and the Act of Congress of April 29, 1902, as amended and re-enacted by Section V of the Deficiency Act of April 7, 1904, [2] which said Acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts; and that he, the said Commissioner, intends to deport the said detained Siu Mooy Chew away from and out of the United States to the Republic of China on a steamer sailing from the Port of San Francisco on July 26th, 1923.

That the said Commissioner of Immigration claims that the said detained arrived at the Port of San Francisco on or about the 19th day of April, 1923, Ex. SS. "Pres. Cleveland," #22058/4-26, and thereupon made application to enter the United States as the minor son of Siu Say, your petitioner,



a lawfully domiciled Chinese merchant actively engaged in business in the firm of Yet Sing Company, Suisun, California, and that the application of the said detained to enter the United States as the minor son of a lawfully domiciled merchant was denied by the said Commissioner of Immigration; that an appeal was thereupon taken from the excluding decision of the said Commissioner of Immigration to the Secretary of the Department of Labor, and that the said Secretary of Labor thereafter dismissed the said appeal. That it is claimed by the said Commissioner that in all of the proceedings had herein the said detained was accorded a full and fair hearing; that the action of the said Commissioner and the said Secretary was taken and made by them in the proper exercise of the discretion committed to them by the statutes in such cases made and provided and in accordance with the regulations promulgated under the authority contained in said statutes.

But, on the contrary, your petitioner, on his information and belief, alleges that the hearing and proceedings had herein and the action of the said Commissioner of Immigration and the said Secretary of Labor was and is in excess of the authority committed to them by the said statutes, and in this behalf your petitioner alleges:

That at the hearing accorded the said detained upon his [3] application for admission as the minor son of a lawfully domiciled merchant, the evidence introduced and submitted upon behalf of the said detained was of such a conclusive kind and

character and was of such legal weight and sufficiency that it was an abuse of discretion on the part of the said Commissioner of Immigration and the said Secretary of Labor not to be guided thereby.

That your petitioner is informed and believes that the denial of admission of the detained is based upon immaterial discrepancies alleged to have occurred in the testimony of your petitioner and the said detained, and the denial on that ground is based upon prejudice against the detained because he is of the Chinese race.

That your petitioner has not in his possession any part of the record or testimony submitted upon the examination of the case of the said detained under the direction of the said Commissioner of Immigration, nor any copy of the reports rendered thereon, nor copies of the proceedings had before the Secretary of Labor at Washington, and a copy of the said proceedings being in the possession of the said Commissioner, your petitioner does therefore stipulate that when a copy of the said immigration record is brought before this Court and produced by the immigration authorities, in accordance with their custom and practice in cases of this character, that your petitioner will then and there agree and ask that the said immigration record so presented be deemed and considered part and parcel of this petition, with the same force and effect as if filed herewith.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the Commissioner of Immigration, and

directing him to hold the body of the said detained within the jurisdiction of this Court, and to present the body of the said detained before this Court, at a time and place to be specified in said order, together with the time and cause of his detention, so that the same may be inquired into, [4] all to the end that the said detained may be permitted to enter the United States and take up his residence therein, having a lawful right to said privilege, and that he may thereafter go hence without day.

Dated July 25th, 1923.

JOSEPH P. FALLON,  
Attorney for Petitioner. [5]

State of California,  
City and County of San Francisco,—ss.

Siu Say, being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has heard read said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

SIU SAY.

Subscribed and sworn to before me this 25th day of July, 1923.

[Seal] WM. E. SCHORD,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Jul. 25, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[6]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 17,945.

In the Matter of SIU MOOY CHEW,  
#22058/4-26 Ex. SS. "Pres. Cleveland,"  
April 19, 1923; Merchant's Son; on Habeas  
Corpus.

**Order to Show Cause.**

Upon reading and filing the verified petition of Siu Say, praying for the issuance of the writ of habeas corpus.

IT IS HEREBY ORDERED that John D. Nagle, as Commissioner of Immigration at the Port of San Francisco, at Angel Island, be and appear before the above-entitled Court, Department Number Two thereof, on Monday, the 30th day of July, 1923, to show cause, if any he have, why a writ of habeas corpus should not issue in this matter and the petition granted as prayed, and this at the hour of 10 o'clock A. M. of said day; and

IT IS FURTHER ORDERED that said Siu Mooy Chew be not removed from the jurisdiction of this Court until the further order of this Court; and

IT IS FURTHER ORDERED THAT a copy of this order be served upon said John D. Nagle, or such other person having the said Siu Mooy Chew in custody as an officer of said John D. Nagle.



Dated July 25th, 1923.

JOHN S. PARTRIDGE,  
United States District Judge.

[Endorsed]: Filed Jul. 25, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[7]

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In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 17,945.

In the Matter of SIU MOOY CHEW,  
#22058/4-26 Ex. SS. "Pres. Cleveland,"  
April 19, 1923; Merchant's Son; on Habeas  
Corpus.

**Demurrer to Petition for Writ of Habeas Corpus.**

Comes now the respondent, John D. Nagle, Commissioner of Immigration, at the Port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

**I.**

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.



WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JOHN T. WILLIAMS,  
United States Attorney.  
THOMAS T. CALIFRO,  
Asst. United States Attorney,  
Attorneys for Respondent.

[Endorsed]: Filed August 27, 1923. Walter B. Maling, Clerk. [8]

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At a stated term of the Southern Division of the United States District Court for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 27th day of August, in the year of our Lord, one thousand nine hundred and twenty-three. Present: the Honorable WM. C. VAN FLEET, District Judge.

No. 17,945.

In the Matter of SIU MOOY CHEW, on Habeas Corpus.

**(Order Denying Petition for Writ, etc.)**

This matter came on regularly this day for hearing on order to show cause as to issuance of a writ of habeas corpus herein. J. P. Fallon, Esq., was present for and on behalf of petitioner and detained. Thos. T. Califro, Esq., Asst. U. S. Atty., was present for and on behalf of respondent, and

filed demurrer to petition, and all parties consenting thereto, it is ordered that the Immigration records be filed as Respondent's Exhibits "A," "B," "C," "D" and "E" and that the same be considered as part of original petition. After due consideration had thereon, the Court ordered that said demurrer to petition for writ of habeas corpus be and the same is hereby sustained, the petition for writ of habeas corpus denied and order show cause discharged. [9]

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In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 17,945.

In the Matter of SIU MOOY CHEW,  
#22058/4-26 Ex. SS. "Pres. Cleveland,"  
April 19, 1923; Merchant's Son; on Habeas  
Corpus.

### **Notice of Appeal.**

To the Clerk of the said Court, and to the Honorable John T. Williams, United States Attorney in and for the Southern Division of the United States District Court, for the Northern District of California, Second Division.

You, and each of you, will please take notice that Siu Say, the petitioner in the above-entitled matter, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment rendered, made and entered

herein August 27th, 1923, denying the petition for a writ of habeas corpus filed herein.

JOSEPH P. FALLON,  
Attorney for Petitioner.

[Endorsed]: Filed Sep. 4, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[10]

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In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 17,945.

In the Matter of SIU MOOY CHEW,  
#22058/4-26 Ex. SS. "Pres. Cleveland,"  
April 19, 1923; Merchant's Son; on Habeas  
Corpus.

**Petition for Appeal.**

Comes now Siu Say, the petition in the above-entitled matter, and respectfully shows:

That on the 27th day of August, 1923, a judgment and order was made by the above-entitled Court and entered herein denying a writ of habeas corpus in the above-entitled matter and dismissing the petition of said petitioner for a writ of habeas corpus in which said judgment and order certain errors were committed to the prejudice of the above-named Siu Mooy Chew, which more fully appear by his assignment of errors filed herewith.

WHEREFORE, your petitioner prays that an appeal may be allowed to the United States Circuit

Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that the Clerk of the above-entitled Court be directed to make and prepare a transcript of all the papers, proceedings and record of the above-entitled matter and to transmit the same to the United States Circuit Court of Appeals for the Ninth Circuit, within the time allowed by law, and for an order that the execution of the warrant of deportation of said Siu Mooy Chew be stayed pending this appeal.

JOSEPH P. FALLON,

Attorney for Petitioner.

[Endorsed]: Filed Sep. 4, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Dep. Clerk.  
[11]

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In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 17,945.

In the Matter of SIU MOOY CHEW,  
=22058/4-26 Ex. SS. "Pres. Cleveland,"  
April 19, 1923; Merchant's Son; on Habeas  
Corpus.

### Assignment of Errors.

Now comes the petitioner, Siu Say, through his attorney, Joseph P. Fallon, Esq., and sets forth the errors he claims the above-entitled Court committed in denying his petition for a writ of habeas corpus as follows:

I.

That said Court erred in not granting said petition for a writ of habeas corpus.

II.

That said Court erred in denying said petition for a writ of habeas corpus.

III.

That said Court erred in holding that the petition did not show or tend to show that said Siu Mooy Chew did not obtain or was accorded a full and fair hearing or any legal hearing, by said immigration officers or by said Secretary of Labor.

IV.

That the Court erred in not holding that the evidence submitted upon the application of the said detained to enter the United States was of such a conclusive kind and character and was of such legal weight and sufficiency that it was an abuse of discretion on the part of said immigration officials not to be guided thereby.

JOSEPH P. FALLON,

Attorney for Petitioner.

[Endorsed]: Filed Sep. 4, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[12]



In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 17,945.

In the Matter of SIU MOOY CHEW, #22058/4-26 Ex. SS. "Pres. Cleveland," April 19, 1923; Merchant's Son; on Habeas Corpus.

**Order Allowing Appeal.**

It appearing to the above-entitled Court that Siu Say, the petitioner herein, has this day filed and presented to the above Court his petition praying for an order of this Court allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and order of this Court denying a writ of habeas corpus herein and dismissing his petition for said writ, and good cause appearing therefor;

IT IS HEREBY ORDERED that an appeal be and the same is hereby allowed as prayed for herein; and

IT IS HEREBY FURTHER ORDERED that the Clerk of the above-entitled Court make and prepare a transcript of all the papers, proceedings and record in the above-entitled matter and transmit the same to the United States Circuit Court of Appeals, for the Ninth Circuit within the time allowed by law; and

IT IS FURTHER ORDERED that the execution of the warrant of deportation of said Siu Mooy Chew be and the same is hereby stayed pending

this appeal and that the said Siu Mooy Chew be not removed from the jurisdiction of this Court pending this appeal.

Dated Sept. 4th, 1923.

JOHN S. PARTRIDGE,  
United States District Judge.

[Endorsed]: Filed Sep. 4, 1923. Walter B. Mal-  
ling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[13]

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In the Southern Division of the United States Dis-  
trict Court for the Northern District of Cali-  
fornia, Second Division.

No. 17,945.

In the Matter of SIU MOOY CHEW, on Habeas  
Corpus.

**Stipulation and Order Respecting Withdrawal of  
Immigration Record.**

It is hereby stipulated and agreed by and be-  
tween the attorney for the petitioner and appellant  
herein and the attorney for the respondent and ap-  
pellee herein, that the original immigration record  
in evidence and considered as part and parcel of  
the petition for a writ of habeas corpus upon hear-  
ing of the demurrer in the above-entitled matter,  
may be withdrawn from the files of the Clerk of  
the above-entitled Court and filed with the Clerk  
of the United States Circuit Court of Appeals in  
and for the Ninth Circuit, there to be considered  
as a part and parcel of the record on appeal in the

above-entitled case with the same force and effect as if embodied in the transcript of the record, and so certified to by the Clerk of the Court.

Dated San Francisco, Cal., September 5, 1923.

JOHN T. WILLIAMS,

Attorney for Respondent and Appellee.

JOSEPH P. FALLON,

Attorney for Petitioner and Appellant.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said immigration record therein referred to may be withdrawn from the office of the Clerk of this Court and filed in the office of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by this Court.

Dated San Francisco, Cal., September 5th, 1923.

JOHN S. PARTRIDGE,

United States District Judge.

[Endorsed]: Filed Sept. 5, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[14]

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**Certificate of Clerk U. S. District Court to Transcript on Appeal.**

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 14 pages, numbered from 1 to 14, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the matter of Siu Mooy Chew

on Habeas Corpus No. 17945, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein), and the instructions of the attorney for petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Five Dollars and Eighty Cents (\$5.80) and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal issued herein (page 16).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of September, 1923.

[Seal]

WALTER B. MALING,  
Clerk.

By C. M. Taylor,  
Deputy Clerk. [15]

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### **Citation on Appeal.**

United States of America,—ss.

The President of the United States, to John D. Nagle, Commissioner of Immigration, Port of San Francisco, and John T. Williams, United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals

for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein Siu Say is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable ———, United States District Judge for the Southern Division of the Northern District of California, this — day of September, A. D., 1923.

JOHN S. PARTRIDGE,  
United States District Judge.

[Endorsed]: No. 17945. United States District Court for the Northern District of California. Siu Say, Appellant, vs. John D. Nagle, Commissioner of Immigration, Port of San Francisco. Citation on Appeal. Filed Sept. 5, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[16]

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[Endorsed]: No. 4103. United States Circuit Court of Appeals for the Ninth Circuit. Siu Say, Appellant, vs. John D. Nagle, as Commissioner of Immigration, Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the



Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed September 8, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



No. 4103

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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SIU SAY,

*Appellant,*

VS.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,

*Appellee.*

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BRIEF FOR APPELLANT.

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JOSEPH P. FALLON,

*Attorney for Appellant.*

FILED

NOV 10 1923

F. D. MONKTON



No. 4103

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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SIU SAY,

*Appellant,*

VS.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,

*Appellee.*

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## BRIEF FOR APPELLANT.

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### Statement of the Case.

This is an appeal from the order and judgment of the lower court sustaining the demurrer interposed and denying a petition for a writ of habeas corpus.

Siu Mooy Chew, a Chinese boy, made application to enter the United States on the 19th day of April, 1923, at the port of San Francisco as the minor son of Siu Say, a domiciled Chinese merchant of Suisun, California.

The mercantile status of the father, Siu Say, is conceded. Siu Mooy Chew was refused and denied admission by the Secretary of Labor on the ground that the claimed relationship of Siu Mooy Chew to



the said Siu Say had not been established to the satisfaction of the said Secretary of Labor.

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### **Specification of Errors.**

1. That the hearing accorded the applicant was unfair for the reason that the immigration authorities approached the matter of the relationship of father and son in a prejudiced state of mind and that fact precluded a fair and impartial hearing.

2. That the action of said officials was not consistent with the fundamental principles of justice as embraced within the concept of due process of law.

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### **Argument.**

The applicant, Siu Mooy Chew, was entitled to a hearing in good faith and if any unfairness was manifested by the examining officers at any stage of the proceedings to determine his right to enter, the hearing was without due process of law.

“The decision must be after a hearing in good faith, however summary.” *Chin Yow v. United States* (208 U. S. 12; 28 Sup. Ct. 201, 52 L. Ed. 369); “and it must find adequate support in the evidence.” *Zakmaite v. Wolf* (226 U. S. 272, 274; 33 Sup. Ct. 57, L. Ed. 218).

That the inspector assigned to hear and report the case as to the relationship of father and son, and upon whose report the final decision of the Secretary

of Labor was based, was prejudiced and unfair, is indicated in his report. The father's mercantile status was investigated at his place of business at Suisun, California, but because he elected to have the question of relationship decided at Angel Island, the inspector commented as follows:

"I believe the reason the hearing of this case on relationship was asked to be done at the Island was for the purpose of coaching. This is brought out very forcibly by the testimony of the applicant on re-examination in the case of an alleged sister of the alleged father. It will be noted how absolutely in ignorance the applicant was on this subject when first examined April 26th. Now (May 18th), without any help whatever from the outside, he claims to have all of the knowledge on this person."

How can an official who entertains such an opinion give an applicant a fair trial?

That the Secretary of Labor recognized the unfair attitude on the part of the examining inspector is shown by the final decision of the Department on page 60, Exhibit "A", which reads as follows:

"It appears that the alleged father has a sister. The applicant on his original examination was closely questioned on this point and had no knowledge whatever of his father's sister. On re-examination, however, after his alleged father had testified he testified regarding his sister, his only explanation for not mentioning her in the previous examination being that he had first given her as a cousin and did not want to change, fearing that a wrong conclusion would be drawn if he did. In connection with the fact that the alleged father and the applicant testi-

fied at Angel Island rather than being examined on the relationship feature at Suisun, Inspector Wurm has indulged in some unwarranted speculation and inference. He concludes that because these persons were presented at Angel Island they were brought to San Francisco in order that coaching might be resorted to, and he apparently also assumes that it was necessary to bring them to San Francisco in order to get into unauthorized conversation with the applicant. The Board of Review can find nothing whatever in the record to support the inference and Inspector Wurm's argument is labored and without apparent reason. Apparently it is nothing more than suspicion."

The most important part of the proceedings conducted by the immigration authorities relative to the right of aliens to enter the United States is the primary examination and if that is conducted in an unfair and prejudiced state of mind by the officers assigned to that duty, it vitiates the whole investigation, and will preclude any applicant from presenting convincing proof of his claims.

We respectfully request that the order of the District Court denying the issuance of the writ of habeas corpus be reversed, and that the writ of habeas corpus issue as prayed for.

Dated, San Francisco,

November 19, 1923.

Respectfully submitted,

JOSEPH P. FALLON,

*Attorney for Appellant.*

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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SIU SAY,

*Appellant,*

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco,

*Appellee.*

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## BRIEF FOR APPELLEE

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JOHN T. WILLIAMS,

*United States Attorney.*

ALMA M. MYERS,

*Asst. United States Attorney.*

*Attorneys for Appellee.*





No. 4103

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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SIU SAY,

*Appellant,*

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco.

*Appellee.*

---

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## BRIEF FOR APPELLEE

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### ARGUMENT.

The petition herein alleges unfairness on the part of the immigration authorities in denying the application of Siu Mooy Chew to enter the United States. Siu Mooy Chew claims to be the son of Siu Say. Admittedly the alleged father is a domiciled Chinese merchant and it is shown that he was in China at a time to permit of his being the parent of the applicant, who is now sixteen years old.

The testimony of the following persons was heard relative to the relationship claim: Siu Say, the alleged father; Siu Mooy Kit, an alleged brother, who was admitted to the United States in the year 1917, and a Chinese witness named Low Quai.

The record (Exhibit D, page 15) shows that Siu Mooy Kit testified in 1917 respecting his paternal grandmother as follows:

“Q. What is the name, age and kind of feet of your father’s mother?

A. Wong Shee, 81 years old, has natural feet.

Q. Where does she live?

A. At the Soo Moo Yin village in my house.

Q. Any others living in your house besides your grandmother and brother?

A. No.”

Siu Say, the alleged father, testified at the same hearing in 1917 concerning the same matter as follows:

“Q. Do any others live in your house besides your own family?

A. My mother and a servant girl.

Q. What is the name, age and kind of feet of your mother?

A. Wong Shee, natural feet, seventy-one years old.” Ex. D, p. 20.

At the present time the testimony of Siu Mooy Kit, the alleged brother, is as follows:

“Q. What is your paternal grandmother’s name and whereabouts?

A. Wong Shee, she died several days before I came to the United States from China.

Q. Why did you say when you came here that she was living?

A. If they asked me that I said: ‘She is dead.’

Q. At that time you said your father’s mother was Wong Shee, 81, natural feet, ‘living in my house in Sow Mee Yuen village’; that ‘she lived there with my brother only.’ What have you to say to that? That was asked you in three different questions.

A. If I said that I don’t know why I did. she died before I left China.” Ex. A, p. 26.

The alleged father’s testimony in the instant case on the same point was as follows:

“Q. What is your mother’s name and whereabouts?

A. Wong Shee, she died six years ago, in 1917.

Q. Did your mother die before your son Mooy Kit came to this country?

A. Yes.

Q. Did you have more than one mother?

A. Only one.

Q. Was that mother's name Wong Shee?

A. Yes.

Q. Are you sure she died in 1917?

A. Yes, she died the year Mooy Kit came to this country, he told me about it.

Q. Where did she live before she died?

A. In my brother Siu Gaw Gee's house in the same village." Ex. A, p. 28.

Siu Mooy Chew, the present applicant, was questioned concerning his paternal grandmother as follows:

"Q. Are your father's parents living?

A. My paternal grandfather is dead. My paternal grandmother is living. Ex. A, p. 9.

Q. Describe your paternal grandmother.

\* \* \* \* \*

A. Wong Shee, 87 years, natural feet, now living in my home village." Ex. A, p. 10.

The substance of the discrepancy then is that the present applicant states that his paternal grandmother is living in the same village from which the applicant comes, while his alleged father and brother say that this woman is dead.

Another disagreement in the testimony which was considered by the immigration authorities is substantially as follows:

The applicant testified that all of his schooling

had been in the home village of Sow Mee Yuen. Ex. A, 23, 24.

His alleged father testified that the applicant had also attended school recently in Shek Kee City, which information he had received from the applicant's uncle Siu Gaw Gee. Ex. A, p. 27. The alleged brother states also that the applicant had attended school in Shek Kee City, the applicant having written him a letter containing this information. Ex. A, p. 25. The witness, Low Quai, states that he met the applicant in Shek Kee City last year when he, witness, was home on a visit. He was introduced to the applicant, he states, by Siu Gaw Gee, the uncle of the applicant, who mentioned that the applicant was the son of Siu Gee. Ex. A, p. 39. It is noted that the witness, when he arrived in the United States upon his return from China, stated that he had not been introduced to the son, daughter or wife of any resident of the United States. Ex. C, p. 18.

The discrepancies noted are some of the grounds on which the Secretary of Labor found against the applicant. Clearly the discrepancies are concerning matters about which the witnesses cannot be presumed to be mistaken and their discordant testimony in this respect clearly justifies the adverse finding of the administrative officers.

In such a case we believe the rule *falsus in uno, falsus in omnibus*, should be applied.



In the case of the Santissimo Trinidad, 7 Wheaton 283, 5 L. Ed. 454, the Supreme Court said:

“If the circumstances respecting which the testimony is discordant be immaterial, and of such a nature, that mistakes may easily exist, and be accounted for with the utmost faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind, or other than from deliberate error. But where a party speaks to a fact in respect of which he cannot be presumed to be liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice under such circumstances, are bound, upon principles of law and morality and justice to apply the doctrine *falsus in uno, falsus in omnibus*.”

When the applicant was originally examined on the 26th of April, 1923, he was questioned regarding the sisters and brothers of his alleged father (Ex. A, p. 8). He stated that his father had one brother, no sisters.

“Q. Are you sure your father never had a sister?

A. Yes, he never had a sister.

Q. Did you ever know or hear of a man named Mar Chun Gun?

A. No.

Q. According to the statement of your father and brother, when the latter was an applicant for admission in 1917, your statement that your father has no sister is incorrect?

A. If he has a sister, I don't know it. I never heard of any.

Q. Do you know anybody by the name of Mar Sheung?

A. Yes.

Q. Who is he?

A. He is a son of my aunt, a cousin of my father.

Q. Are you sure Mar Sheung is not a son of a sister of your father?

A. Yes."

Upon the examination of the alleged father respecting the same subject on May 18, found at page 28 of Exhibit A, the father stated he had one sister; that she was married to Mar Dai, who died a long time ago, and explained the reason that the applicant did not know anything about his having a sister by saying "Probably he was not told by my mother." Subsequently the applicant was again examined and given an opportunity to make any changes in his prior statement. The testimony being found on page 23 of Exhibit A. He then states as follows:

"My father had a sister which I did not mention before, I said before it was a cousin of my father."

Q. Where is your father's sister now?

A. She is married. I don't know where she is living.

Q. Do you know her husband's name?

A. He is a Mar family name. I don't know his full name.

Q. How many children has she?

A. She has one son, no daughter. The son's name is Mar Sheung.

Q. Where did you get your information about your father's sister?

A. From my memory.

Q. How is it your memory is so good today and so poor before?

A. After my first hearing I thought it over about making a mistake, but did not ask to change it at that time.

Q. You were asked several questions along the same line and if you knew it was not correct, what you said, why did you not change it?

A. After he asked me on that point, I knew I was wrong, but did not want to change it because I was afraid you might think I was giving incorrect information.

Q. The Examining Inspector at that time hinted to you all the time that your father had a sister, why should you hold out the information if you knew it was a fact that your father had such a relative?

A. I was afraid to change it."

From a consideration of the foregoing testimony pertaining to the question of whether applicant had a paternal aunt or not the Examining Inspector commented in his report as follows:

“I believe the reason the hearing of this case on relationship was asked to be done at the Island (instead of at Suisun) was for the purpose of coaching. This is brought out very forcibly by the testimony of the applicant on re-examination in the case of an alleged sister of the alleged father. It will be noted how absolutely in ignorance the applicant was on this subject when first examined on April 26th. Now (May 18th) without any help from the outside, he claims to have all knowledge of this person.” Ex. A, p. 30.

Counsel contends that the foregoing remarks of the Inspector indicate that the Inspector was prejudiced and that the hearing was unfair.

But the Secretary of Labor, to whom appeal was taken, did not agree with nor concur in the inferences and remarks of the Inspector, but rejected them in no uncertain terms as follows: (See Exhibit “A,” page 59.)

“In connection with the fact that the alleged father and the applicant testified at Angel Island rather than being examined on the relationship feature at Suisun, Inspector Wurm has indulged in some unwarranted speculation and inference. He concludes that because these persons were presented at Angel Island they were brought to San Francisco in order that

coaching might be resorted to, and he apparently also assumes that it was necessary to bring them to San Francisco in order to get into unauthorized conversation with the applicant. The Board of Review can find nothing whatever in the record to support the inference and Inspector Wurm's argument is labored and without apparent reason. Apparently it is nothing more than suspicion."

There is nothing to indicate that the Secretary's decision was based on the opinion found in the inspector's report hereinabove referred to—quite the contrary this feature of the case was rejected in toto.

The applicant was given a full and fair opportunity to be heard and all testimony offered by himself and his witnesses was received. Without reference to this phase of the inspector's report, it conclusively appears therefrom that the evidence submitted did not establish the relationship claimed, and eliminating this paragraph the Secretary was able to and did make a fair and independent finding on the evidence.

It is manifest that the applicant's case was not prejudiced by the conclusions of the inspector because the Secretary rejected said conclusions and expressly shows that they did not influence his decision.

The basis for the Secretary's' decision is to be found in the discrepancies in the testimony which have already been noted.



This being the case the general rules of law applicable are too well settled and familiar to call for extended citation of authorities or discussion.

Congress has by the immigration statutes conferred upon the executive officers final and exclusive jurisdiction to hear and determine whether any particular individual is an alien and eligible to admission in so far at least as such determination depends on conclusions reached on disputed questions of fact. (*United States v. Sprung*, 187 Fed. 903.) The court will not go into the sufficiency of probative facts. (*White v. Gregory*, 213 Fed. 768.) Where the executive officers found that the evidence in support of the alien's right to land was so impaired by discrepancies as to render it unsatisfactory, the court is not authorized to reverse that conclusion. (*Jeung Bock Hong and Jueng Bock Sing v. White*, 258 Fed. 23.)

It is urged that the action of the Secretary of Labor in denying the application of Siu Mooy Chew to enter the United States and ordering his deportation is clearly a lawful exercise of the authority which the law has conferred upon the Secretary.

Respectfully submitted,

JOHN T. WILLIAMS,  
*United States Attorney.*

ALMA M. MYERS,  
*Asst. United States Attorney.*  
*Attorneys for Appellee.*



No.

3171

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

---

G. W. BRAINARD, as Trustee in Bankruptcy of  
the PACIFIC CO-OPERATIVE LEAGUE  
STORES, INC., Bankrupt,

Appellant,

vs.

SAN DIEGO CO-OPERATIVE ASSOCIATION,  
Appellee.

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**Transcript of Record.**

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**Upon Appeal from the United States District Court for  
the Southern District of California,  
Southern Division.**

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FILED

APR 11 1934

U. S. DISTRICT COURT



No.

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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G. W. BRAINARD, as Trustee in Bankruptcy of  
the PACIFIC CO-OPERATIVE LEAGUE  
STORES, INC., Bankrupt,

Appellant,

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SAN DIEGO CO-OPERATIVE ASSOCIATION,  
Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the Southern District of California,  
Southern Division.

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## INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	PAGE
Answer .....	11
Assignment of Errors.....	155
Citation .....	2
Exceptions to Report .....	51
Names and Addresses of Attorneys.....	1
Order .....	63
Order .....	153
Order Allowing Appeal.....	159
Order to Show Cause.....	20
Opinion .....	148
Petition for Allowance of Appeal.....	157
Petition for Order to Show Cause.....	16
Petition in Reclamation .....	4
Praecipe .....	161
Report of Special Master.....	22
Report and Recommendation of Special Master..	44
Statement of Evidence:	
Testimony on Behalf of Petitioners:	
Dennison, J. R.....	143
Eason, Charles J.....	71
Cross-Examination .....	84
Recalled .....	144
Gastil, Walter G.....	97
Gleason, Mrs. Bertha.....	91

	PAGE
Gue, Stanley M.....	88
Hadland, John A. ....	66
Huggins, Walter .....	93
Mays, Charles J.....	92
Neal, W. S.....	87
Piltcher, C. H.....	64
Retsloff, Carl O.....	105
Romaine, Monott .....	104
Testimony on Behalf of Respondent:	
Ames, E. O. F.....	142
Barnes, Walter .....	117
Cross-Examination .....	120
Bishoff, J. N.....	110
Dobbs, H. H. ....	136
Cross-Examination .....	141
Floaten, H. A.....	128
Cross-Examination .....	134
Israel, H. C. ....	125
Cross-Examination .....	125
Johnson, A. A.....	106
Cross-Examination .....	109
Johnson, A. A.....	145
Seibert, John S.....	121
Cross-Examination .....	124
Simpson, Nora W.....	126
Stipulation .....	159
Stipulation of Facts.....	146

### **Names and Addresses of Attorneys.**

For Appellant G. W. BRAINARD, Trustee in Bankruptcy of the Estate of Pacific Co-Operative League Stores, Inc., Bankrupt:

NORMAN A. BAILIE, Esquire;

JOSEPH KIRK, Esquire, and

W. T. CRAIG, Esquire. Board of Trade Rooms, Higgins Building, Los Angeles, California.

For Appellees San Diego Co-Operative Association:

MARCUS W. ROBBINS, Esquire;

ELMER J. HERTEL, Esquire;

McNeece Block, San Diego, California.

IN THE DISTRICT COURT OF THE UNITED  
STATES SOUTHERN DISTRICT OF CALI-  
FORNIA SOUTHERN DIVISION  
IN EQUITY F-99.

---

In the Matter of the Petition of	)	
Meyer Cloak & Suit Co., etc., et al,	)	
for the appointment of Ancillary	)	CITATION.
Receiver for the PACIFIC CO-	)	
OPERATIVE LEAGUE STORES.	)	
INC.,	)	
	)	
	)	Bankrupt.

---

TO THE                      SAN DIEGO CO-OPERATIVE  
ASSOCIATION:—

You are hereby CITED and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco in the State of California, on the 19th day of June, A. D. 1923, pursuant to the appeal duly obtained and filed in the Clerk's office of the District Court of the United States in and for the Southern District of California, in that certain controversy arising in the matter of the Petition of Meyer Cloak & Suit Co., etc., et al, for the appointment of Ancillary Receiver for the Pacific Co-Operative League Stores, Inc., between yourself and Wm. H. Moore, Jr., the Ancillary Receiver appointed in said matter, over the ownership of three (3) grocery stores at San Diego, California, and now pending in the District Court of the United States for the Southern District of California, Southern Division, and being numbered F-99 Equity, wherein



G. W. Brainard, as Trustee in Bankruptcy of the Estate of the said Pacific Co-Operative League Stores, Inc., bankrupt, is appellant and you are appellee,

Then and there to show cause, if any there be, why the minute order of said Court of November 23rd, 1922 and the final order of said Court of December 8th, 1922, both confirming the report of the Special Master Glenn H. Munkelt, and directing said Ancillary Receiver to deliver possession of said stores to said San Diego Co-Operative Association, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

DATED: May 21st, 1923.

Wm P James  
United States District Judge.

Form No. 282

Return on Service of Writ.

United States of America

Southern District of California

} SS:

I hereby certify and return that I served the annexed Citation on the therein-named Meyer Cloak & Suit Co. by handing to and leaving a true and correct copy thereof with Maurice W. Robbins personally at San Diego in said District on the 22d day of May, A. D. 1923.

A. C. Sittel

---

U. S. Marshal  
By R. F. Gusweiler

---

Deputy.

(Endorsed): Service of the within citation is hereby admitted this 22 day of May, 1923. Maurice W. Robbins, Elmer J. Hertel, Attorneys for San Diego Hotel Association.

Filed Jun 8, 1923 Chas. N. Williams, Clerk By W. J. Tufts Deputy Clerk

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IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DIS-  
TRICT OF CALIFORNIA

In Equity # F-99

In the Matter of	)	
The Petition of Meyer Cloak)		
& Suit Co., etc. et al, for the)		PETITION
appointment of Ancillary)	IN	RECLAMATION
Receiver for PACIFIC CO-)	AND FOR AN	
OPERATIVE LEAGUE)	ACCOUNTING	
STORES, Inc.,	)	
Bankrupt.	)	

To the District Court of the United States, for the Southern District of California:

The petition of the San Diego Co-operative Association respectfully shows and alleges:

FIRST: That your petitioner is the owner, and entitled to the immediate possession of the property set forth in Schedule "A" hereto annexed, and made a part hereof, and that the value of said property is about Twenty Thousand (\$20,000.00) Dollars.

SECOND: That your petitioner further alleges, upon information and belief, that heretofore, and on or about the 27th day of February, 1922, an involuntary petition in bankruptcy was filed in the office

of the Clerk of the U. S. District Court, for the Northern District of California, by three (3) creditors of the above bankrupt, praying that the said Pacific Co-operative League Stores, Inc., be adjudged an involuntary bankrupt, and that thereafter G. W. Brainard, Esq., was duly appointed as temporary Receiver in Bankruptcy of the said Pacific Co-operative League Stores, Inc., and that subsequent to his appointment a petition was filed in the District Court of the United States for the Southern District of California by the Meyer Cloak & Suit Company, etc., et al, for the appointment of an Ancillary Receiver for the said Pacific Co-operative League Stores, Inc., in the Southern District; that upon said petition said Court duly appointed as Ancillary Receiver of said bankrupt, William H. Moore, Esq., and that pursuant to the order of his appointment and a subsequent order, after the hearing of an order to show cause, served upon the Sheriff of San Diego County, in the State of California, he did take possession of, and continues to hold the property mentioned and described in the Schedule hereunto annexed and made a part hereof, marked Exhibit "A" and that the said property was in the original piece in which it was delivered to the Sheriff of the County of San Diego, State of California; that on the 15th day of March, 1922, the said Pacific Co-operative League Stores, Inc., was duly adjudicated a bankrupt.

THIRD: That heretofore, and before the commencement of this proceeding, due demand was made by your petitioner upon the said William H. Moore,

Esq., Ancillary Receiver, that he deliver possession of the said personal property in said Schedule "A" mentioned, to your petitioner, but that said demand has been refused.

FOURTH: That the San Diego Co-operative Association is an association of laboring men, and their families, that have joined together for the purpose of conducting stores on the co-operative plan and thereby reduce their cost of living; that said association was formed on or about the 22nd day of November, 1919 and that about said time, and in the said City of San Diego they appointed and employed the Pacific Co-operative League, a co-operative business Association as their Trustee, to receive all of the moneys arising out of the conduct of said business, to disburse the same for the benefit of said business in paying bills and expenses contracted by the said S. D. Co-operative Association, and to keep the books and accounts of said stores.

That at the time of the establishment of said relation between the San Diego Co-operative Association and the Pacific Co-operative League, it was understood and agreed that the said San Diego Co-operative Association should elect a Board of Managers to co-operate with the Pacific Co-operative League in the management of said business, and that said Board of Managers should have an equal vote in the management of the said business with the Pacific Co-operative League and should consult and advise with the Pacific Co-operative League in all matters pertaining to the management of the said business and in the se-



lection and choice of a Manager to conduct the said business.

That since said time the Pacific Co-operative League has violated the terms of said trust and in the following particulars, to-wit:

It has prevented the Board of Managers elected by said persons from having any choice at all in the management of said business or in the selection of a Manager; that it has diverted the funds arising from said business to purposes wholly foreign and not connected with said business in any way; that it has taken cash from the said stores and loaned the same to other institutions situated in the State of California; that it has taken money from the said stores and used the same for its own purposes and that none of said moneys have been returned to the said stores, all of which has been contrary to the will and wish of said persons and the said Board of Managers elected by them. That on or about the 1st day of November, 1921 the Pacific Co-operative League sold to, and the Pacific Co-operative League Stores, Inc., purchased from, and took possession of, all of the personal property mentioned in Schedule "A" annexed hereto, being the stores owned by the San Diego Co-operative Association, without their knowledge or consent to said sale.

That on or about the 3rd day of November, 1921, E. C. Bellows, Commissioner of Corporations for the State of California issued a second amended permit to the Pacific Co-operative League Stores, Inc.; that the following paragraph appears in said permit: "In



exchange for the assets, subject to the liabilities, and the business of the Pacific Co-operative League, the applicant proposes to issue to said Pacific Co-operative League five hundred shares of its common capital stock"; that your petitioner further alleges upon information and belief, that five hundred shares of the common capital stock of the Pacific Co-operative League Stores, Inc., was issued to the Pacific Co-operative League in exchange for the assets, and subject to the liabilities in the business of the Pacific Co-operative League.

That on the 15th day of December, 1921, the said San Diego Co-operative Association met and discharged the said Pacific Co-operative League as its Trustee, as aforesaid, and appointed the Board of Directors of the San Diego Co-operative Association as its trustees to conduct the said business in their behalf until other trustees should be appointed by them; that the names of the persons elected as their trustees are as follows, to-wit: Charles J. Eason, Ed Crolie, Stanley M. Gue, Charles B. Lynch, Charles J. Mayes, Mrs. P. T. Mannen and Marcus W. Robbins.

That no accounting has ever been had between said San Diego Co-operative Association and the Pacific Co-operative League, and that the San Diego Co-operative Association is ignorant of the amount due or owing to the said San Diego Co-operative Association by the Pacific Co-operative League, but they are informed, and believe, and upon such information and belief allege that there is due to said San Diego Co-operative Association a large sum of money, and they

allege that an accounting is necessary to determine the amount due to said San Diego Co-operative Association by the Pacific Co-operative League.

FIFTH: That the said personal property mentioned in Schedule "A" annexed hereto has not been taken by virtue of a warrant against your petitioner for the collection of any tax, assessment, or fine, issued in pursuance of a Statute of the United States, and they have not been seized by virtue of an execution or warrant of attachment from, or through whom your petitioner has derived title to the said chattels.

WHEREFORE your petitioner does respectfully pray that the said William H. Moore, Esq., as said Ancillary Receiver herein, be directed to deliver to your petitioner the said property in Schedule "A" mentioned and described; and that an accounting be had; and that the Pacific Co-operative League and the Pacific Co-operative League Stores, Inc., be ordered to account to the San Diego Co-operative Association and that this Court thereupon make its order, giving your petitioner judgment against the Pacific Co-operative League Stores, Inc., for the amount so found to be due; and that your petitioner have such other and further relief, as to this Honorable Court may seem just and proper.

DATED 27 day of March, 1922.

San Diego Cooperative Association  
Petitioner

Marcus W. Robbins

---

Elmer J. Hertel  
Attorneys for Petitioner  
505 Southern Title Building  
San Diego, California

## SCHEDULE "A"

That certain personal property in the City of San Diego, County of San Diego, State of California, described as follows:

All the stock in trade, fixtures, furniture, equipment, books of account, moneys, and other personal property located upon the premises situated in the City of San Diego, County of San Diego, State of California, and generally known as 618 Fifth Street, 426 Market Street, 1033 Broadway, together also with the good will of the general merchandise business being carried on at said places.

State of California County of San Diego—ss.

Ed Crolie being first duly sworn deposes and says: That the Petitioner is an association of persons known as The San Diego Cooperative Association and that Ed Crolie is an executive officer of said Association, to-wit: Vice President, and makes this verification for and on behalf of said Petitioner; That he has read the within and foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters which are herein stated on information or belief and as to those matters he believes them to be true.

Ed Crolie.

Subscribed and sworn to before me this 27th day of March A. D., 1922.

[NOTARIAL SEAL]

Marcus W. Robbins,  
Notary Public San Diego County State of California.

(Endorsed): Received copy of 'within petition this 29th day of March, 1922. Wm. H. Moore, Jr., Ancillary Receiver.

Filed Mar 30, 1922 Chas. N. Williams, Clerk By R. S. Zimmerman Deputy

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[TITLE OF COURT AND CAUSE.]

ANSWER OF ANCILLARY RECEIVER TO PETITION OF SAN DIEGO CO-OPERATIVE ASSOCIATION

Comes now Wm. H. Moore, Jr., and answering the petition in reclamation and for an accounting hereinbefore filed by the San Diego Co-operative Association, respectfully admits, denies and alleges, as follows:

I.

Alleges that respondent is the duly appointed, qualified and acting Ancillary Receiver in Bankruptcy for the assets of the Pacific Co-operative League Stores, Inc., Bankrupt, situated in the Southern District of California.

II

Respondent has not sufficient information or belief to enable him to answer the allegations contained in the first paragraph of said petition, to the effect that said petitioner is the owner of and entitled to the possession of the property mentioned and described in Schedule A attached to said petition, and by reason of said lack of information and belief, denies that said petitioner is the owner of or entitled to the im-



mediate, or any other possession of any of the property set forth in said Schedule A. Respondent is informed and believes, and upon such information and belief alleges, that the property mentioned and described in said petition and in Schedule A attached thereto, was, at the date of the filing of the petition herein, a part of the assets of said Pacific Co-operative League Stores, Inc., Bankrupt, and that upon the election and qualification of a Trustee in Bankruptcy of the estate of said Pacific Co-operative League Stores, Inc., Bankrupt, the title to all of said property will be vested in said Trustee.

### III

Admits each and every allegation contained in the second paragraph of said petition.

### IV

Admits each and every allegation contained in the third paragraph of said petition.

### V

Respondent is not sufficiently informed and has no sufficient belief to enable him to answer certain of the allegations contained in the fourth paragraph of said petition, and by reason of such lack of information and belief denies that the San Diego Co-Operative Association is an association of laboring men, or an association of laboring men and their families joined together for the purpose of conducting stores, as alleged in said petition, and denies that said association was formed on or about the 22nd day of November, 1919, and that said association at said date, or at any other time or at any place, appointed and employed,



or appointed or employed the Pacific Co-operative League, or any other association, as their Trustee, or in any other capacity, to receive all moneys arising out of the conduct of said business, or any business, or to disburse the same in paying bills and expenses contracted by said San Diego Co-operative Association, or any other association or person, or to keep the books and accounts of said stores, or any other stores.

By reason of said lack of information and belief respondent denies, that it was understood and agreed, or understood or agreed that said San Diego Co-operative Association should elect a Board of Managers to co-operate with said Pacific Co-operative League in the management of said business, or in any other way, and denies that said Board of Managers was to have an equal vote in the management of said business with the Pacific Co-operative League, or to have any vote at all in the management of any business with which said Pacific Co-operative League was connected, or in which it had any interest, or that said Board of Managers should consult and advise, or consult or advise, with said Pacific Co-operative League in all matters, or any matters pertaining to the management of said business or the selection or choice of a manager to conduct the said business, or to consult or advise in any way in regard to the conduct and management of any business in which said Pacific Co-operative League had any interest.

By reason of said lack of information and belief, respondent denies that said Pacific Co-operative League

has diverted the funds arising from said business, or any business, to purposes wholly foreign and not connected therewith, and denies that said Pacific Co-operative League has taken cash from said stores, or any of them, and loaned the same to other institutions situated in the State of California or anywhere else. Admits that on or about the 1st day of November, 1921 said Pacific Co-operative League sold to, and that the Pacific Co-operative League Stores, Inc., the bankrupt above named, purchased from and took possession of all of the personal property mentioned in said petition and Schedule A annexed thereto, but respondent is not sufficiently informed, nor has he sufficient belief to enable him to answer the allegation contained in said petition, that said sale was without petitioner's knowledge or consent, and by reason of said lack of information and belief denies that said sale was without the knowledge and consent of said petitioner, and respondent is informed and believes and upon such information and belief alleges, that said petitioners had no interest in or to said stores, and that their knowledge or consent in regard to said sale was neither necessary nor material.

Respondent is not sufficiently informed and has not sufficient belief to enable him to answer the allegations contained in the paragraph on page 4 of said petition, relative to the discharging of said Pacific Co-operative League as Trustee, and the appointment of a Board of Directors as its Trustee, to conduct said business, and by reason of said lack of information and belief, denies that on the 15th day

of December, 1921, the said San Diego Co-operative Association met and discharged the said Pacific Co-operative League as its Trustee, or that said Pacific Co-operative League was in any way Trustee for said San Diego Co-operative Association, and denies that said San Diego Co-operative Association appointed the Board of Directors of said San Diego Co-operative Association to conduct said business, or any business, or that it had any right whatsoever to appoint a Trustee for the purpose of conducting any stores in the possession of said Pacific Co-operative League, or said Pacific Co-operative League Stores, Inc.

By reason of said lack of information and belief, respondent denies that no accounting has ever been had between said San Diego Co-operative Association and said Pacific Co-operative League, or that any amount is due or owing to said San Diego Co-operative Association from said Pacific Co-operative League, and denies that any accounting is necessary between said San Diego Co-operative Association and said Pacific Co-operative League, or that any accounting is material or proper in this proceeding, as between said San Diego Co-operative Association and said Pacific Co-operative League Stores, Inc., the above named bankrupt.

WHEREFORE, respondent prays that said petition may be dismissed.

Wm. H. Moore, Jr.

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Respondent.

W. T. Craig

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Attorney for Respondent.

United States of America	} ss.
Southern District of California	
Southern Division	
County of Los Angeles	

WM. H. MOORE JR. being duly sworn says:  
That he is Ancillary Receiver in the foregoing entitled matter; that he has read the foregoing Answer of Ancillary Receiver to petition of San Diego Co-Operative Association, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters, that he believes it to be true.

Wm. H. Moore, Jr.

Subscribed and sworn to before me this 4th day  
of April A. D. 1922

(NOTARIAL SEAL)

Bess A. Aldrich

Notary Public in and for the County of Los Angeles,  
State of California.

(Endorsed): FILED April 5, 1922. Chas. N.  
Williams, Clerk.

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[TITLE OF COURT AND CAUSE.]

PETITION FOR ORDER TO SHOW CAUSE.

THE PETITION of Wm. H. Moore, Jr., respectfully represents:

I

That he is the duly appointed, qualified and acting Ancillary Receiver in Bankruptcy for the assets in the Southern District of California, belonging to the Pa-



cific Co-operative League Stores, a corporation, bankrupt. That said bankrupt had its principal place of business at San Francisco in the Northern District of California, and has been adjudicated bankrupt by order of the United States District Court for said Northern District of California.

## II

That upon the appointment of your petitioner as such Ancillary Receiver and the adjudication in bankruptcy of said bankrupt, James C. Byers, Sheriff of San Diego County, California, had in his possession, under writs of attachment issued in that certain action then pending in the Superior Court of the City and County of San Francisco, State of California, entitled "W. H. Cordes, plaintiff, vs. Pacific Co-operative League Stores, Inc., Defendant," three stores at the following locations in the City of San Diego, County of San Diego, this District and Division, viz: No. 1033 Broadway, Nos. 616-20 Fifth Street and No. 426 Market Street, which said Sheriff had attached as the property of said defendant, and was holding at the date of adjudication in bankruptcy of said bankrupt, as the property of said defendant under and by virtue of said writs of attachment so issued as aforesaid.

## III

That under and by virtue of an order heretofore made and entered herein, said Sheriff was directed to deliver said stores into the possession of your petitioner as such Ancillary Receiver, and said stores are now in petitioner's possession as such Ancillary Receiver.



## IV

That petitioner is informed and believes and upon such information and belief alleges, that Jack Larripa, Ed. Crolic, Charles J. Mayes, Stanley M. Gue, Clifford C. Costenborder and Charles B. Lynch, who claim to be associated together, and with other persons, and doing business under the name and style of San Diego Co-operative Association, claim some right, title and interest in and to said three stores, and to each of them, but petitioner is informed and believes and upon such information and belief alleges, that neither of said individuals nor said Association have any right, title or interest in and to said stores, and that the same are the property of said bankrupt.

## V

That before this estate can be administered in bankruptcy, it will be necessary to determine the rights of said parties in and to said three stores, and said right should be determined at the earliest date possible.

WHEREFORE, petitioner prays that an order may be made and entered herein requiring said Jack Larripa, Ed Crolic, Charles J. Mayes, Stanley M. Gue, Clifford C. Costenborder and Charles B. Lynch, for and on their own behalf, and on behalf of said San Diego Co-operative Association, to be and appear before this Honorable Court at a time and place to be named in said order, then and there to show cause if they or either of them may have, why an order should not be made and entered herein decreeing that said three stores, and each of them, are the property of the Pacific Co-operative League Stores, a corpora-

tion, now bankrupt, and of the Trustee in Bankruptcy hereafter to be elected, of the estate of said bankrupt. And further to show cause why said stores should not be sold by said Trustee as the property of said estate, and why it should not be determined that neither said parties nor any of them, nor said San Diego Co-operative Association has or have any right, title or interest therein, and why said parties and each of them, their agents, representatives, employees and attorneys should not be perpetually restrained and enjoined from in any way claiming or representing that they have, or that either of them, or said San Diego Co-operative Association, has any right, title or interest in or to said stores, or either of them, and from prosecuting any action for the purpose of establishing or enforcing any such claim, and restraining said Jack Larripa, Ed Crolic, Charles J. Mayes, Stanley M. Gue, Clifford C. Costenborder and Charles B. Lynch, and said San Diego Co-operative Association from proceeding in any Court other than this Court, to establish any claim of right, title or interest in or to said stores, pending the hearing and determination of said order to show cause.

Wm. H. Moore, Jr.

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Petitioner.

W. T. Craig

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Attorney for Petitioner.

United States of America	} ss.
Southern District of California	
Southern Division	
County of Los Angeles	

WM. H. MOORE, JR. being duly sworn says: That he is THE PETITIONER in the foregoing entitled matter; that he has read the foregoing Petition for Order to Show Cause and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters, that he believes it to be true.

WM. H. MOORE, JR.

Subscribed and sworn to before me this 28th day of March A. D., 1922

[NOTARIAL SEAL] BESS A. ALDRICH  
Notary Public in and for the County of Los Angeles,  
State of California

Endorsed: Filed Mar 30 1922. Chas. N. Williams,  
Clerk; By Edmund L. Smith, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

### ORDER TO SHOW CAUSE.

On reading and filing the verified petition of Wm. H. Moore, Jr., and on motion of W. T. Craig, (H. R. Archbald, of Counsel), good cause appearing therefor,

IT IS ORDERED, that Jack Larripa, Ed Crolic, Charles J. Mayer, Stanley M. Gue, Clifford C. Costenborder and Charles B. Lynch, and the San Diego Co-operative Association, and each of them, be, and

appear before this Honorable Court on the 5th day of April, 1922, at 10 o'clock, A M, at the Court room thereof, in the City of San Diego, then and there to show cause if any they, or either of them may have, why an order should not be made and entered herein, granting the prayer of the petition of Wm. H. Moore, Jr., and decreeing that the three stores mentioned and described in said petition, are the property of the estate of said Pacific Co-operative League Stores, a corporation, bankrupt, and of the Trustee of said bankrupt, hereafter to be elected. And further to show cause why said stores and each of them should not be sold as an asset of said estate, and why it should not be determined that said parties do not have, nor do any of them, any right, title or interest in and to said stores, and why they and each of them should not be restrained from in any way claiming or asserting any interest therein.

AND IT IS FURTHER ORDERED, that pending the hearing and determination of said order to show cause that said parties and each of them, their agents, representatives, employees and attorneys, be, and they are hereby restrained from proceeding in any other Court other than this Court, or the Court of Bankruptcy in which the main administration is pending, for the purpose of establishing their claim to said stores.

AND IT IS FURTHER ORDERED, that service of this order may be made by delivering a copy hereof, together with a copy of the petition upon which the



same is based, to said parties and each of them, at least 5 days prior to said 5th day of April, 1922.

Bledsoe

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UNITED STATES DISTRICT JUDGE.

(Endorsed): Filed Mar 30, 1922. Chas. N. Williams, Clerk By Edmund L. Smith Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

REPORT OF SPECIAL MASTER.

TO THE HONORABLE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA. SOUTHERN DIVISION:

I, Glen H. Munkelt, the undersigned to whom as Special Master the application of the San Diego Co-Operative Association for an order directing the Ancillary Receiver in the above entitled matter to deliver to petitioner certain property described in said petition and the order to show cause issued upon petition of said Ancillary Receiver and the issues raised by said pleadings were duly referred by order dated April 15, 1922, for examination, testimony and report do hereby report as follows:

That the above matter was duly brought on for hearing before me in the court room of the above entitled Court in the Federal Building at San Diego, California, on the 24th day of April, 1922, and the matter heard and continued from day to day to and including the 27th day of April, 1922.



That at said hearing the petitioner, the San Diego Co-Operative Association, appeared by and through its attorneys Elmer J. Hertel and Marcus W. Robbins and by and through several of its directors;

That the Ancillary Receiver Wm. H. Moore, Jr. appeared by and through his attorney Norman A. Bailie;

That Pacific Co-Operative League Stores, a corporation, a bankrupt, and the Pacific Co-Operative League, a corporation, a bankrupt, appeared by and through their attorney Byron F. Stone Jr. and by and through their President E. O. Ames.

That at said hearing oral and documentary evidence was introduced and received and a stenographic report thereof taken and a transcribed record of said testimony is herewith filed and made a part of this report.

That from the evidence received the Special Master reports that the following facts have been established.

1.

That on November 22, 1919, and for some time prior thereto certain persons in San Diego, California, had associated themselves together for the purpose of co-operative buying; that said association was unincorporated and named itself "San Diego Consumers Co-Operative Association"; that said organization with a larger membership continued during the time herein under discussion, the name of said organization being changed at one time to the San Diego Co-Operative Association, subsequently changed to the Pacific Co-Operative League, San Diego Branch, and again changed to the present name of petitioner, the San Diego Co-Operative Association; that said organiza-

tion at no time has complied with Section 2466 to 2468 inclusive of the Civil Code of the State of California; that during the time herein referred to said organization had a Board of Directors which held regular meetings and whose activity is hereafter more fully described; (for brevity this organization is hereafter termed the local organization without reference to its specific name unless the name appears to be material.)

2.

That on or about October 13, 1913, the Pacific Co-Operative League was incorporated under and by virtue of the laws of the State of California and particularly under Title XX of the Civil Code of the State of California, with its principal place of business at San Francisco, California. That in the year 1913 the said Pacific Co-Operative League adopted By Laws for its government. Said By Laws continued in effect and were in effect at the times herein mentioned. Copy of said By Laws being introduced in evidence and marked Petitioner's Exhibit 12. The following are extracts from said By Laws which have bearing upon the controversy before the Court:

"Second: That the purpose for which this Association is formed is to promote the theory of co-operation and to advance its practical development, to establish a central bureau of information, education, publicity, and general service, and to provide literature and lectures; to assist in and promote conventions for the general advance of the co-operative movement; to act as organizers, promoters, advisers and auditors for co-operative associations and to assist independent co-

operative enterprises to work in unity with one another and to develop a federation of co-operative bodies for mutual advantage."

"Article II Sec. 2. Definition of "Associate" member. In order that persons may become associated with the Pacific Co-Operative League and enjoy the clubbing and trading as well as the social and educational privileges of the association without assuming or incurring any liabilities beyond the investment of loan capital as hereinafter provided, and in order that such persons be organized into locals or branches that they may operate stores or enterprises, the Board of Directors may provide rules and regulations to admit and retain "associate members" and to charter them into branches with representation on the Board of Directors."

"Article VIII Sec. 5. Members' branch meetings. The Board of Directors shall have power to devise ways and means for regular business, social and educational meetings for the various branches of the association."

"Article IX Sec. 3. Operation of Branches. In order to permit the operation of branch stores by associate members as provided in Article II Section 2, it is hereby provided that the Board of Directors may upon request from a group of associate members order a survey of any district selected for a branch store to be made, decide the number of members and the capital required to operate such branch. If the directors, as a result of said survey, decide in favor of establishing such branch, the capital may be provided by a payment

of each applicant who is not already an associate member of Ten Dollars (\$10.00) for associate membership, plus such payments for loan capital by each associate member as shall by the total number of persons applying provide the capital necessary to establish the branch in business. The conditions governing capital payments in Sections 6 and 7 in Article 2 shall apply to loan capital, provided however that the loan capital paid by the members of a local store may be returned in whole or in part at the dissolution of their store according to its then actual value at the time of such dissolution."

"Article IX Sec. 4. Each local branch upon being admitted into the Pacific Co-Operative League shall transfer to the league the funds collected as loan capital for the establishment of its store, for which there shall immediately be issued membership loan capital certificates. The Central Board of Directors of the Pacific Co-Operative League shall then proceed to institute the store and shall provide equipment and stock for the same within the funds as above provided, and shall also extend its wholesale operations as and when necessary to serve efficiently said branch. The Central Board of Directors of the Pacific Co-Operative League shall render monthly or oftener, if necessary, a statement covering fully all transactions between the central body and the said branch."

"Article IX Sec. 5. By-Laws for locals. Local branches or the Central Board of Directors shall prepare by-laws and rules in conformity with the general constitution for the conduct of the local branches.



Such by-laws shall be approved by the Central Board of Directors and placed on file in the central office."

"Article X Sec. 1. (a) All business of this association shall be conducted on a strictly cash basis. (b) In the establishment of local distributing warehouses, stores, factories, or other business extension, cash or its equivalent must be in hand sufficient to cover the investment. (c) In no case shall the Board of Directors incur liabilities for operating expenses unless there is a reasonable prospect of income to more than cover the same. (d) Business extensions of every character under the league system shall be founded and continued only upon a basis of self support. In the event of any business branch of the association failing to show prospects of becoming self supporting, the same shall be discontinued at the earliest possible moment."

"Article X Sec. 3. This association is not in business to make profit but to supply its members at the lowest possible cost on the Rochdale Plan. It proposes to eliminate all unnecessary middlemen and to provide a short cut method of distribution from producer to consumer, thereby steadily reducing the cost of living. Its aim is to assume control of industries and production and free as rapidly as possible the natural resources of the earth that such reduction of the cost of living may speedily and effectively be consummated."

### 3.

That in the latter part of the year 1919 communication arose between the local association and Pacific



Co-Operative League and at this time printed matter including copies of the by-laws were circulated among the members of the local association and to persons who might and did become members of the local association.

## 4.

That on or about the 7th day of February, 1920, A. A. Johnson, the official organizer of the Pacific Co-Operative League, arrived in San Diego for the purpose of taking subscriptions to the co-operative organization, the form of the subscription being hereinafter set forth.

## 5

That in addition to the representations contained in the by-laws of the said Pacific Co-Operative League, oral representations were made by the said official organizer to the effect that the Pacific Co-Operative League was interested in promoting co-operative buying; that it was not organized for profit, that it rendered to its members services in the way of educational advantages, club buying, and where stores were organized the League managed the stores, furnishing expert managers therefor, who were trained in co-operation; that the League would do the bookkeeping for the local stores, audit the books and make reports to the local stores monthly, or more frequently if necessary; that the local stores would be financed by money subscribed by the local people, which would be returned on dissolution of the stores; that the money subscribed by the local members would bear interest at 5%, to be paid from the profit of the business of the

local stores; that the subscribers would share in the profits of the local stores in proportion to the amount of goods which they themselves purchased from the local stores; that the business of other branch stores would not be taken into consideration in fixing profits or interest upon the money subscribed by San Diego people.

6.

That at the time said representations were made by organizer Johnson subscriptions were circulated in San Diego in form marked Petitioner's Exhibit 5 A, as follows:

"That the undersigned hereby agree to subscribe for membership in the San Diego branch co-operative store and agree to pay thereon the sum of \$50.00 in cash or installments on receiving notice of collection."

7.

That the subscribers at the time of organization were also presented with and signed a subscription blank in form marked Respondent's Exhibit 1, which is as follows:

"PACIFIC CO-OPERATIVE LEAGUE, INC.

No. 1752.

236 Commercial St. San Francisco.

Affiliated with the National and International Co-Operatives.

I, the undersigned in order to assist in the establishment of the CO-OPERATIVE STORE (branch of Pacific Co-Operative League) at San Diego, hereby

subscribe the sum of \$. . . . . of which \$10.00 is for  
associate membership and the balance for. . . . .

(State whether

.....  
first payment on loan capital or new loan or instal-  
ment) for investment by Pacific Co-Operative League  
in said store to be entitled to interest and privileges  
according to the by-laws.

I agree to pay of the above amount \$50.00 deposit  
with this application and the balance as follows:

Amount paid: \$50.00      Signed Chas. H. Peltcher.

Associate Member \$. . . . Address, Ocean Beach, S. D.

Loan capital \$. . . . . Received by A. G. Rogers, A.

Johnson.

Loan \$      San Francisco, Cal.

Total \$. . . . . Feb. 14, 1920.

The white copy is the members official receipt.

The blue copy must be returned to the central office  
with cash, check or deposit slip.

The yellow copy must be retained by the local store or  
field representative."

## 8.

It was agreed that each subscriber in San Diego  
should contribute the sum of \$50.00; \$10.00 to be set  
aside as associate membership in the Pacific Co-Opera-  
tive League, as provided in the by-laws; that the re-  
maining \$40.00 was to be loan capital, as provided in  
the by-laws, the payment of said \$40.00 being evidenced  
by certificate in form marked Petitioner's Exhibit 9,  
which is as follows:

"Co-Operation.

Producer                      Consumer

The link that binds.

PACIFIC CO-OPERATIVE LEAGUE. INC.

San Francisco, California.

Incorporated Oct. 13, 1913. Not Operated for Profit.

CERTIFICATE OF LOAN CAPITAL (Without  
liability.)

Received of George F. Gray

(The holder hereby agrees) the sum of Forty, &  
(that this Certificate is ) 00/100 Dollars \$40.00 as  
(liable to forfeiture in the) loan capital. This loan  
(event the holder becomes ) capital is to be invested  
(indebted to the Pacific ) in the Pacific Co-Opera-  
(Co-Operative League. ) tive League for the use  
PACIFIC of the Co-Operative store  
CO-OPERATIVE LEAGUE at San Diego, Calif. in  
SEAL accordance with the By-  
San Francisco, California. Laws of the Pacific Co-  
Operative League.

PACIFIC CO-OPERATIVE LEAGUE

Ernest O. F. Ames, President.

Attest: W. S. Huntington, Registrar.

Dated, San Francisco, Cal. Aug. 30, 1920."

9.

That at the time said subscriptions were taken and said loan certificates issued, no statement was made other than may be ascertained from the By-laws as to who would own the stores purchased from the money subscribed as loan capital by the San Diego people. It was not represented that the stores would or would not belong to the Pacific Co-Operative League, nor was it represented that the stores would belong to the persons subscribing the loan capital.



## 10.

That the local organization and the Pacific Co-Operative League, through their organizer and officers, co-operated in raising money on the subscriptions above referred to, for the purpose of establishing and purchasing a store or stores in San Diego. That prior to August 11, 1920, the Board of Directors of the local organization, assisted by A. A. Johnson, official organizer of the Pacific Co-Operative League, made a survey of San Diego with the view of purchasing or establishing a store or stores. That after investigation it was agreed by the Board of Directors of the local organization and the representatives of the Pacific Co-Operative League to purchase three stores then the property of the Consumers Grocery Company, Inc., of which Justin W. Hammond was the President.

## 11.

That in the performance of said agreement the Board of Directors of the local association on August 11, 1920, entered into a contract for the purchase of the said three grocery stores, which contract is marked Petitioner's Exhibit 7. Said contract is signed by the Consumers Grocery Company, Inc., by Justin W. Hammond President, and the San Diego Co-Operative Association (the then name of the local organization) by J. N. F. Bischoff President and Charles J. Eason Secretary. The contract of purchase provided for an agreement of sale to be approved by the Pacific Co-Operative League. This approval was subsequently given by the Pacific Co-Operative League. That at the time said contract of purchase was executed there



has been subscribed in San Diego an amount in excess of \$20,000.00 as loan capital, through the efforts of the official organizer and the assistance of the Board of Directors of the local organization. That at the time of the signing of said contract on August 11, 1920 a draft for the sum of \$1,000.00 was drawn in favor of the Consumers Grocery Company, which was in due course of business paid by the Pacific Co-Operative League and charged to the account of the San Diego stores. That at the time said draft was drawn and paid the said Pacific Co-Operative League had received from the subscriptions above referred to money considerably in excess of the amount of the said draft.

12.

That subsequent to the signing of said contract H. A. Floatin, a store supervisor for the Pacific Co-Operative League, came to San Diego to consummate the purchase of said three grocery stores.

13.

That on September 1, 1920, the Consumers Grocery Company, Inc. caused to be executed and recorded in the office of the Recorder of San Diego County a notice of intention to sell the three grocery stores herein described. Said notice of sale recited that the property would be sold to the Pacific Co-Operative League, Inc. that the local organization nor its Directors had notice of the executing and recording of said notice of sale except as would be legally implied from recordation. (Respondent's Exhibit 2.)

## 14.

That in pursuance of the purchase of said stores an inventory of the stock of goods of said three stores was taken by twenty or twenty-one persons. It was agreed that the Consumers Grocery Company and the vendee should furnish an equal number of persons to perform the work of taking the inventory and the persons furnished by the vendee were the Board of Directors of the local organization together with two or three volunteers.

## 15.

That the total purchase price as agreed upon by the vendor and Mr. Floatin was \$21,616.38; that it was not brought to the attention of the local organization or its Board of Directors the fact that the total purchase price was in variance with the contract of purchase of August 11, 1920. The said purchase price was paid as follows: \$1000.00 paid at the signing of said agreement as above described; that on September 1, 1920, a draft was drawn in favor of the Consumers Grocery Company for \$12,000.00 which was and is in words and figures as follows, towit:

"Pacific Co-Operative League, Inc. X00562.

236 Commercial St. San Francisco. No. 8551

Sept. 1, 1920.

PAY TO THE ORDER OF Consumers Grocery Company Twelve Thousand Dollars (\$12,000.00)

being part payment on and charge to account of  
stock of merchandise San Diego Co-Operative Stores.  
and fixtures at 426 Signed H. A. Floatin."

Market St.

618 5th St. and

1033 Broadway.

This draft was paid by the Pacific Co-Operative League; by paying to Consumers Grocery Company the sum of \$5,476.36 from the daily cash sales of the three stores thus reducing the inventory value; and on September 11, 1920 a draft was drawn in favor of the Consumers Grocery Company for \$3,140.02, being the balance due on the purchase price, which draft is Respondent's Exhibit 10, and is in words and figures as follows:

"PACIFIC CO-OPERATIVE LEAGUE. INC.

No. 8557.

236 Commercial St. San Francisco.

Sept. 11, 1920.

PAY TO THE ORDER OF Consumers Groc Com-  
pany Thirty One Hundred Forty & 02/100 Dollars  
(\$3140.02) and charge to account of

being payment for	)	San Diego Branch.
settlement in full	)	Signed H. A.
subject to any minor adjustment.)	)	Floatin Mgr."

This draft was paid by the Pacific Co-Operative League. That on the 11th day of September, 1920 and at the time said final payment was made, a Bill of Sale was made and executed by the Consumers Grocery Company and delivered to H.A.Floatin, which is Respondent's Exhibit 3, and is in words and figures as follows to-wit:

## "KNOW ALL MEN BY THESE PRESENTS

That CONSUMERS GROCERY CO. (Inc) 426 Market St., the parties of the first part, for and in consideration of the sum of TEN Dollars..... of the United States of America, to us in hand paid by THE PACIFIC CO-OPERATIVE LEAGUE (Inc.), the parties of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey, unto the said parties of the second part, its executors, administrators and assigns, One Ford delivery car, and the furniture and fixtures and grocery stock located in stores at  
426 Market St.

620 Fifth St.

1033 Broadway

(this bill of sale void in case of failure of the Pacific Co-Operative League to pay draft drawn on San Francisco this date.)

TO HAVE AND TO HOLD the same to the said parties of the second part, its executors, administrators and assigns forever.

And they do for their heirs, executors and administrators, covenant and agree to and with the said parties of the second part, its executors, administrators and assigns, to warrant and defend the sale of said property, goods and chattels, hereby made unto the said parties of the second part, its executors, administrators and assigns, against all and every person or persons, whomsoever, lawfully claiming or to claim the same.



WITNESS our hands and seal this 11th day of  
Sept. 1920.

CONSUMERS GROCERY CO.,

426 Market St.

Justin Hammond, Pres.

(Reverse Side)

BILL OF SALE

Consumers Groc Co. to Pacific Co-Operative League.

Dated September 11th, 1920.”

16.

That said bill of sale was not recorded and no notice of its execution and delivery was ever given to the local organization, or to its Board of Directors.

17.

That at the time said stores were purchased, and particularly on September 11, 1920, there had been paid upon subscriptions above described, the sum of \$15,393.00; that subsequently payments were made on said subscriptions to loan capital making a total of \$20,363.88, which sums were received by the Pacific Co-Operative League.

18.

That in addition to the moneys so paid on subscriptions to loan capital, \$2,000.00 had been received and delivered to Pacific Co-Operative League upon a note executed by the local organization signed by its officers and endorsed by the Pacific Co-Operative League to one W. Templeton Johnson; that said note was subsequently paid.

19.

That on September 11, 1920, the three stores purchased from the Consumers Grocery Company,



were opened under the management of H. A. Floatin, and for a short time operated under the name of Consumers Grocery Company, the name being changed shortly afterwards to the Pacific Co-Operative League Store, San Diego Branch.

## 20.

That at the time said stores were purchased the local organization had a Board of Directors which met once each week and continued so to meet. At these meetings the manager of the stores was usually present, and made informal reports, and once a month had a formal report. That the local Board of Directors gave no orders to the local manager as to the way in which he should manage the stores, but discussed with him certain questions and did order certain small repairs made and did request the local manager to pay certain small bills incurred by the local organization for their entertainment and for stationery used by the Board of Directors.

## 21.

That subsequent to the purchase of said stores the name Pacific Co-Operative League Store, San Diego Branch, was placed on the three stores as shown by Petitioner's Exhibit 6. That on or about October 1920, a sign was placed in front on store No. 3 by Mr. Johnson with the knowledge and consent of H. A. Floatin, the manager in charge which is in words and figures as follows:

"To reduce the cost of living. This store owned by 550 families. Ask the clerk how you can join them."

The sign was placed there because a labor parade was to pass the store.

22.

That on or about January 20, 1921 the local organization adopted By-Laws for its government which By-Laws were approved by the Pacific Co-Operative League.

23.

That the manager of said San Diego stores was paid from the receipts of said stores, some of it being paid from the daily cash receipts, and other times being paid by check from the home office at San Francisco.

24.

That the merchandise purchased for said San Diego stores was paid for by check of the local manager from the money received at said stores and deposited in a bank in San Diego in the name of the Pacific Co-Operative League.

25.

That the manager of said Diego stores was bonded to the Pacific Co-Operative League.

26.

That the insurance on said San Diego stores was issued in the name of Pacific Co-Operative League.

27.

That the assessment for taxes on said San Diego stores was returned in the name of Pacific Co-Operative League.

28.

That no notice of the facts set forth in Findings

numbered 26 and 27 was brought to the Board of Directors of the local organization.

29.

That the amount to be paid the subscriber of loan capital for interest and dividends or rebate on purchases was computed by the Board of Directors of the local organization from data submitted to them by the manager of the stores; that this computation was forwarded to the Pacific Co-Operative League home office for approval. That thereafter dividend and interest cards were sent to the persons entitled thereto in form as Respondent's Exhibit 4, which is as follows:

"407. PACIFIC CO-OPERATIVE LEAGUE.

San Francisco. Jan. 1- 1921.

To the Manager of San Diego Branch.

Pay to or credit Sam F. Williams \$1.54 One & 54/100 Dollars, being in full payment of dividend and interest to Dec. 31, 1920.

PACIFIC CO-OPERATIVE LEAGUE

E. Ames.

San Diego Branch.

It can be exchanged for cash.

Member will strike out the line not wanted and sign here in full settlement. WHEN REDEEMED MANAGER MUST FORWARD WITH DAILY REPORT.

(On reverse side.)

(1) ADDED CAPITAL.

Please place to credit of loan capital in my name.

Name .....

(2) Redeemed in cash.

Name Sam F. Williams.

(3) REDEEMED IN MDSE.

Name .....

“35 To be cashed at store only.

PACIFIC CO-OPERATIVE LEAGUE.

San Francisco. Jan 1, 1921.

To the manager of San Diego Branch.

Pay to, or Credit Chas. J. Eason \$2.23 Two & 23/100  
Dollars being in full payment of dividend and in-  
terest to Dec. 31, 1920.

2. It can be taken out in trade by member.

PACIFIC CO-OPERATIVE LEAGUE.

E. Ames. D.

San Diego Branch.

Member will strike out the  
line not wanted and sign here  
in full settlement.

Chas. J. Eason.

WHEN REDEEMED MANAGER MUST FOR-  
WARD WITH DAILY REPORT.

(Reverse side)

(1) ADDED CAPITAL

Please place to credit of loan capital in my name.

Name .....

(2) REDEEMED IN CASH.

Name .....

(3) REDEEMED IN MDSE.

Name Chas. J. Eason.”

## 30.

That the San Diego stores were conducted and operated at a profit.

## 31.

That on or about the 1st day of November, 1921, the Pacific Co-Operative League, without the consent or knowledge of the Board of Directors of the local organization, or its members, conveyed to the Pacific Co-Operative League stores all of its assets.

## 32

That on or about the 15th day of December, 1921, the local organization by action of its Board of Directors passed a Resolution severing its relation with the Pacific Co-Operative League, and at a members meeting on December 15, 1921, adopted new By-Laws and changed its name to San Diego Co-Operative Association.

## 33.

That subsequent to the transfer of the assets of the Pacific Co-Operative League to the Pacific Co-Operative League Stores, some of the holders of certificates of loan capital surrendered them to the Pacific Co-Operative League Stores in exchange for certificates of capital stock of the Pacific Co-Operative League Stores. That the Pacific Co-Operative League Stores is a corporation organized under and by virtue of the laws of the State of California.

## 34.

That on or about the 11th day of February, 1922, the Commissioner of Corporations of the State of California made an order revoking the permit of Pacific



Co-Operative League Stores to issue stock. This order of revocation is filed herewith and marked Petitioner's Exhibit . . . . .

35.

That there was no obligation upon the Pacific Co-Operative League to repay to the subscribers the loan capital, except upon dissolution of the stores, and then prorata as the then value of the stores appeared; that there was no provision for the sale or disposition of the San Diego stores.

36.

That the Pacific Co-Operative League was to receive no financial compensation for its services rendered to the San Diego stores, except the \$10.00 which was subscribed as the fee for associate membership in the League.

37.

That the Pacific Co-Operative League and the Pacific Co-Operative League Stores have heretofore been adjudicated involuntary bankrupts.

38.

That the three stores in San Diego above described are now in the possession of Wm. H. Moore, as Ancillary Receiver of the Pacific Co-Operative League Stores.

Respectfully submitted.

Glen H. Munkelt.

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Special Master.

(NOTE) -

It being the opinion of the attorneys representing the several parties to this proceeding that the Special Master should make no conclusions of law or recommendation as to the legal effect of the facts found, this opinion has been conformed to. The Special Master has not made the findings directly on the allegations of the pleadings, for the reason that findings in such form would involve a mixed question of law and fact. The Special Master has attempted to find the facts as established by the evidence in order that the attorneys for the respective parties may present their contentions as to what the legal conclusion is, based upon the facts found.

Glen H. Munkelt.

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Special Master.

(Endorsed): FILED May 16, 1922. Chas. N. Williams, Clerk By Edmund L. Smith, Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

REPORT AND RECOMMENDATION OF  
SPECIAL MASTER

To the Honorable Judge of the District Court of the United States For the Southern District of California, Southern Division:

I, Glen H. Munkelt, the undersigned, to whom as Special Master, the application of the San Diego Co-Operative Association for an order directing the Ancillary Receiver in the above entitled matter to de-

liver to petitioner certain property described in said petition, and the order to show cause issued upon petition of said Ancillary Receiver, and the issues raised by said pleadings, were duly referred by order dated April 15, 1922, for examination, testimony and report, and as to which said order of reference the undersigned has made and filed herein his report, and a second order having been made in the above entitled proceeding on or about May 24, 1922, referring said matters and issues back to the undersigned for further report and recommendation,

Now, therefore, in compliance with said second order of reference and as a supplemental report, the former report being hereby referred to and incorporated and considered a part of this report, do hereby report as follows:

That on the 8th day of June, 1922, Elmer J. Hertel, Esq., and Marcus W. Robbins, Esq., appearing for petitioner herein, and Norman A. Bailie, Esq., appearing for the respondent herein, appeared before the undersigned and presented their arguments as to the findings heretofore filed, and as to the law applicable to this proceeding.

And from such hearing the Special Master makes the following report:

1.

That finding No. 5 of the Master's report heretofore filed herein be amended as follows:

By adding after the word "stores" in the last line on page 5 the words "in the manner provided by the By-laws of said Pacific Co-Operative League".

## 2.

That finding No. 10 of the Master's report heretofore filed be amended as follows:

By adding after the word "Diego" in line 5 of said finding the words "said subscriptions were signed by the subscribers individually in form similar to that set forth in finding No. 7".

## 3.

That finding No. 21 of the Master's report heretofore filed be amended by adding at the end thereof the words "that there was no sign or signs of similar character or import placed on the other two stores".

## 4.

That finding No. 24 of the Master's report heretofore filed be amended by adding to the end thereof the words "that the moneys received from the San Diego stores were deposited in a bank in San Diego, and subsequently transferred to San Francisco where it was deposited in the general account of the Pacific Co-Operative League; that the manner of handling said money and its deposit in respective banks was not known to the owners of the Loan Capital Certificates nor to the Board of Directors of the local organization".

## 5.

The special Master further reports that the San Diego Co-operative Association is an organization of men and women in San Diego, California, who have joined together for the purpose of co-operative buying and said association was formed on or about November 22, 1919, and that subsequent thereto the members of



said association entered into an agreement with the Pacific Co-operative League, a co-operative business association, to act as their agent and representative to receive all the moneys arising out of the conduct of said business, to disburse the same for the benefit of said business in payment of bills and expenses contracted in the operation of said business, to keep the books and accounts of said stores, to disburse and distribute the profits of said stores as provided in the By-Laws of the Pacific Co-operative League.

That at the time of the establishing of said relation between the San Diego Co-operative Association and the Pacific Co-operative League it was understood and agreed that the San Diego Co-operative Association should elect a Board of Directors to co-operate with the Pacific Co-operative League; the said Board of Directors was to advise with and consult with said Pacific Co-operative League and that the Pacific Co-operative League was to manage the three stores described in Schedule "A" attached to the Petition in Reclamation.

That the said Pacific Co-operative League has managed said stores and has appointed its own manager, has not received advice from the Board of Directors of the San Diego Co-operative Association, except as to minor details; that on or about the 1st day of November, 1921, the Pacific Co-operative League sold the Pacific Co-operative League Stores, Inc., the property mentioned in Schedule "A"; that the said sale and transfer was without the knowledge or consent of the San Diego Co-operative Association. That on or



about the 15th day of December, 1921, the San Diego Co-operative Association discharged said Pacific Co-operative League as its agent and representative, and appointed the Board of Directors of the San Diego Co-operative Association as its trustee to conduct the business of the said three stores in their behalf. That the names of the persons elected as their trustee were as follows, to-wit: Charles J. Eason, Ed. Crolic, Stanley M. Gue, Charles B. Lynch, Charles J. Mayes, Mrs. P.T. Mannen and Marcus W. Robbins.

## 6.

That the owners and holders of the Loan Capital Certificates hereinbefore referred to and described, are the owners of the property described in Schedule "A" in the Petition in Reclamation, subject to the rights conferred upon the Pacific Co-operative League to manage said property for their benefit. That the petitioner as the representative of the owners and holders of said Loan Capital Certificates are entitled to possession of said property.

## 7.

That the allegations in Paragraph Fifth of the Petition in Reclamation are true.

## 8.

That the allegations in Paragraph I of the Petition of the Order to Show Cause are true.

## 9.

That the allegations in Paragraph II of the Petition in the Order to Show Cause are true.

## 10.

That the allegations in Paragraph III of the Petition in the Order to Show Cause are true.

11.

That the said San Diego Co-operative Association has some right, title and interest in and to the three stores herein discussed and described in Schedule "A" attached to the Petition in Reclamation.

That the said three stores are not the property of said Bankrupt.

From the foregoing the Special Master as Conclusions of Law reports:

That the three stores described in Schedule "A" attached to the Petition in Reclamation were purchased with the money subscribed by the owners and holders of the Loan Capital Certificates which money was subscribed for the purpose of purchasing said property, with the agreement that the Pacific Co-operative League should manage and operate said stores for the benefit of the owners and holders of the Loan Capital Certificates; and to distribute to the owners and holders of said Loan Capital Certificates the profits of said stores by first paying to said owners and holders of said certificates interest thereon at the rate of 5% per annum, and second, to divide the profits of said stores among the owners and holders of said Loan Capital Certificates in proportion to their purchasers at said stores. That the Pacific Co-operative League by its insolvency and its present status is incapacitated to act as agent and representative of the owners and holders of Loan Capital Certificates and to manage and operate the said three stores in accordance with the terms of its By-Laws, and its agreement with the owners and holders of Loan Capital

Certificates. That as the representative of the owners and holders of Loan Capital Certificates, the petitioner herein and the trustee appointed by it are entitled to possession of said three stores as trustee for the owners and holders of the said Loan Capital Certificates as their interests appear.

That at all times herein the Pacific Co-operative League has had the legal title to said three stores. That the beneficial interest in said stores has at all times herein mentioned been in the owners and holders of the said Loan Capital Certificates.

That the respondents in the Order to Show Cause have shown good and sufficient reason why the prayer in the Petition for the Order to Show Cause should not be granted.

For the foregoing reasons I am of the opinion that the prayer in the Petition for the Order to Show Cause should be denied; that it be decreed that the Ancillary Receiver in Bankruptcy, the respondent in the petition in Reclamation, has no interest in the three said stores and that the said Ancillary Receiver is not entitled to the possession of the said three stores; that an order be made delivering said three stores to the representative of the owners and holders of the Loan Capital Certificates.

I state my fees and expenses as Special Master as follows:

To 4 days of taking and receiving testimony (April 24-25-26-27) at \$50.00 per day,	\$200.00
To 2½ days reading reporter's transcript of testimony and exhibits, and preparing re- port as Special Master at \$50.00 per day,	125.00

To stenographic expense in preparing report as Special Master, 59 folios at 30c per folio,	17.70
To one-half day hearing discussions on questions of law June 8, 1922, and preparation of report and recommendation, June 13 and 14, 1922,	75.00
To stenographic expense in preparing second report as Special Master, 21 folios at 30c per folio,	\$ 6.30
	<hr/>
Total.....	\$424.00

I hereby respectfully submit my report, and request that an order be made directing William H. Moore, Jr., Ancillary Receiver in the above entitled matter to forthwith pay fees and expenses of your Special Master as herein reported.

Respectfully submitted this 15th day of June, 1922.

Glen H. Munkelt

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Special Master.

(Endorsed): Filed Jun. 16 1922 Chas. N. Williams,  
Clerk By Edmund L. Smith Deputy Clerk.

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[TITLE OF COURT AND CAUSE.]

EXCEPTIONS TO THE REPORT OF SPECIAL  
MASTER—

COMES NOW Wm. H. Moore, Jr., Ancillary Receiver, and files the following exceptions to the Report of the Special Master on file herein:



## 1.

Said Ancillary Receiver excepts to Finding No. 1, to the effect that "on November 22, 1919, and "for sometime prior thereto, certain persons in San "Diego, California, had associated themselves together "for the purpose of co-operative buying; that said "association was unincorporated and named itself 'San "Diego Consumers Co-operative Association'; that said "organization with a larger membership continued "during the time herein under discussion, the name of "said organization being changed at one time to the "San Diego Co-operative Association, subsequently "changed to the Pacific Co-operative League, San "Diego Branch, and again changed to the present name "of petitioner, the San Diego Co-operative Association", for the reason that the evidence shows, without contradiction, that there was no organization whatsoever on the 22nd day of November, 1919, but an informal meeting of certain persons to discuss "co-operation".

## 2.

Said Ancillary Receiver excepts to Finding No. 5 and states that there should be added to said Finding a statement to the effect that "at least four of the "seven directors of the local Association understood "from the beginning that the stores were to be owned "and controlled by the Pacific Co-operative League."

## 3.

Said Ancillary Receiver excepts to Finding No. 9 in that it does not state that at least four of the seven directors of the local Association, together with at least one other member, understood from the begin-



ning that the stores were to be owned and controlled by the Pacific Co-operative League.

4.

Said Ancillary Receiver excepts to Finding No. 10 for the reason that it fails to state as the evidence shows that H. A. Floatin and A. E. O. F. Ames, of the Pacific Cooperative League, came down to San Diego and approved of the purchase of the three stores in question.

5.

Said Ancillary Receiver excepts to Finding No. 11 in that it fails to find that at the time of the purchase of said stores, to wit: on the 11th day of September, 1920, and at all times prior thereto, the total amount of loan capital paid in was less than the amount necessary to purchase and pay for said stores and that the entire amount of loan capital paid in up to and including the 11th day of September, 1920, was the sum of \$15,393.00.

6.

Said Ancillary Receiver excepts to Finding No. 13 in so far as it finds that "the local organization nor "its directors had notice of the executing and recording "of said notice of sale except as would be legally "implied from recordation", for the reason that under the law the recordation of the notice of sale was constructive notice to every person interested.

7.

Said Ancillary Receiver excepts to Finding No. 18 in that it fails to find that said note of \$2000.00 referred to therein was paid by the Pacific Co-operative League.

## 8.

Said Ancillary Receiver excepts to Finding No. 20 in that it fails to find as the evidence shows that at all times five members of the Board of Directors of the local organization knew that the stores were owned and controlled by the Pacific Co-operative League.

## 9.

Said Ancillary Receiver excepts to Finding No. 23 for the reason that the evidence shows that from the organization of the stores until after the hiring of Mr. Huggins as Manager, the Manager was always paid by drafts drawn on the Pacific Co-operative League in San Francisco, which said drafts were paid by the checks of the Pacific Co-operative League.

## 10.

Said Ancillary Receiver excepts to Finding No. 24 for the reason that it fails to find that from the organization of the stores and for many months thereafter all bills for merchandise purchased were paid by drafts on the Pacific Co-operative League in San Francisco, which drafts were paid by the checks of the Pacific Co-operative League from its general fund and that thereafter and after the hiring of Mr. Huggins as Manager his name was added to the names of the officers of the Pacific Co-operative League for the purpose of enabling him to check against the account of the Pacific Co-operative League in San Diego and that at all times the bank account from said stores stood in the name of Pacific Co-operative League and not otherwise, and that at least five members of the Board of Directors of the local

organization at all times knew the manner of the handling of said moneys.

11.

Said Ancillary Receiver excepts to Finding No. 26 in that it fails to find that said insurance was paid for by the check of the Pacific Co-operative League from its general funds, and that neither the local organization nor its Board of Directors, nor any of them, made any effort whatever to have said property insured in the name of the local organization, or at all.

12.

Said Ancillary Receiver excepts to Finding No. 27 in that it fails to find that for the years 1921 and 1922 said property was assessed to the Pacific Co-operative League and the tax paid by the Pacific Co-operative League, and that neither the local organization nor its Board of Directors nor any of the subscribers for Loan Capital ever made any attempt to have said property assessed in the name of said local organization.

13.

Said Ancillary Receiver excepts to Finding No. 28 for the reason that it fails to find that the local organization and its Board of Directors had constructive notice of the assessment of said property.

14.

Said Ancillary Receiver excepts to Finding No. 30 in that it fails to find that the investment in said stores was at all times greater than the amount of Loan Capital subscribed and paid.

## 15.

Said Ancillary Receiver excepts to Finding No. 31 in that it fails to find that the majority of the Board of Directors of the local organization consented to said transfer and exchanged their Loan Capital Certificates for capital stock of the Pacific Co-operative League Stores.

## 16.

Said Ancillary Receiver excepts to Finding No. 33 for the reason that it fails to find that 275 out of a total of 550 loan capital subscribers exchanged their Certificates for stock in the Pacific Co-operative League Stores.

## 17.

Said Ancillary Receiver further excepts to the report of said Special Master for the reason that it fails to find that there are creditors of both the Pacific Co-operative League and the Pacific Co-operative League Stores and because it fails to find that at all times the creditors of said Pacific Co-operative League and said Pacific Co-operative League Stores were paid out of the general funds of the Pacific Co-operative League and the Pacific Co-operative League Stores by the checks of said companies.

## 18.

Said Ancillary Receiver excepts to Finding No. 5 of the Supplemental Report of said Special Master for the reason that it finds that the so-called local organization was formed on or about November 22, 1919, and further because it finds that the "members" of said association entered into an agreement with



“the Pacific Co-operative League, a co-operative business association, to act as their agent and representative to receive all the moneys arising out of the conduct of said business, to disburse the same for the benefit of said business in payment of bills and expenses contracted in the operation of said business, to keep the books and accounts of said stores, to disburse and distribute the profits of said stores as provided in the By-Laws of the Pacific Co-operative League”, and said Receiver submits that there is no evidence whatsoever to establish the relation of principal and agent between the so-called local organization and the Pacific Cooperative League.

Said Ancillary Receiver further excepts to said Finding on the ground that there is no evidence whatsoever that the Pacific Co-operative League was to “manage” the three stores described in said petition.

Said Ancillary Receiver further excepts to said Finding No. 5 on the ground that it fails to find that the majority of the Board of Directors of the local organization consented to the transfer to the Pacific Co-operative League Stores, Inc. and that 275 of the 550 loan capital subscribers transferred their loan Capital Certificates to stock in the Pacific Co-operative League Stores.

Said Ancillary Receiver further excepts to said Finding on the ground that there is no evidence to show that the Pacific Co-operative League was ever the agent of the local association or the representative thereof and fails to find that the attempted “discharge” of the Pacific Co-operative League and Pa-



cific Co-operative League Stores by the local organization was null and void and of no effect.

19.

Said Ancillary Receiver excepts to Finding No. 6 of the Supplemental Report in that it finds that the owners and holders of Loan Capital Certificates are the owners of property described in Schedule A of the Petition of Reclamation, and inasmuch as it finds that the petitioner is the representative of the owners and holders of Loan Capital Certificates and in that it finds that said local association is entitled to the possession of said property, or any of it.

20.

Said Ancillary Receiver excepts to Finding No. 7 in that it finds that said property has "not been seized by virtue of an execution or warrant of attachment from or through which your petitioner has derived title to said chattels", for the reason that the Ancillary Receiver representing the Trustee in Bankruptcy stands in the position of a creditor holding a lien by legal or equitable proceedings against said property.

21.

Said Ancillary Receiver excepts to Finding No. 11 in the Supplemental Report of said Special Master in the following particulars:

(a) There is no evidence that said San Diego Co-operative Association has any right, title or interest in or to the three stores described in Schedule A and attached to the Petition in Reclamation;

(b) The evidence shows without conflict that the stores are the property of the bankrupt.

22.

Said Ancillary Receiver further excepts to said Findings of said Special Master on the grounds that he failed to find that the Pacific Co-operative League took out and paid for compensation insurance on all the employees in its own name and that neither the local association nor any of its members ever took out any compensation insurance for the employees.

23.

Said Ancillary Receiver further excepts to said report of said Special Master because said Special Master failed to find that the proceeds of said Loan Capital subscriptions were deposited in a bank in San Diego in the name of the Pacific Co-operative League and withdrawn therefrom by checks of the Pacific Co-operative League and deposited in San Francisco in the name of the Pacific Co-operative League, together with all the other funds of the Pacific Co-operative League from any and all sources, the same consisting of the loan capital from other stores, the proceeds of sales of merchandise from all stores, the proceeds of money borrowed and certain profits made by the Pacific CO-operative League in the way of commissions, also the proceeds of the sales of merchandise by the Pacific Co-operative League to all the stores, being approximately 45 in number, operated by the Pacific Co-operative League, and that all payments of money in the purchase of said stores were made from said common fund and not

otherwise, and furthermore that the evidence shows without conflict that the majority of the Board of Trustees of the San Diego Co-operative Association were at all times aware of the fact that the moneys were being so handled.

#### EXCEPTIONS TO CONCLUSIONS OF LAW:

##### 24.

The said Ancillary Receiver excepts to the Conclusions of Law wherein the said Master finds as Conclusions of Law that the said stores were purchased with the money subscribed by the owners and holders of Loan Capital Certificates.

##### 25.

Said Ancillary Receiver excepts to said Conclusions wherein the Master finds that there was an agreement between the local association or the holders of Loan Capital Certificates to the effect that the Pacific Co-operative League should manage or operate said stores for the benefit of the owners and holders of the Loan Capital Certificates.

##### 26.

Said Ancillary Receiver further excepts to said Conclusions of Law wherein the Master finds that said Pacific Co-operative League agreed to distribute to the owners and holders of the Loan Capital Certificates the profits of said stores by first paying to said owners and holders of said Certificates interest thereon at the rate of five per cent per annum, and second, by dividing the profits of said stores among the owners and holders of said Loan Capital Certificates in proportion to their purchases at said stores, or

otherwise, and said Master erred in not finding as a Conclusion of Law that the Ancillary Receiver representing the Trustee in Bankruptcy herein in his position as a creditor holding a lien on said stores by legal or equitable proceedings is entitled to the possession of said stores.

27.

Said Ancillary Receiver further excepts to said Conclusions of Law wherein the Master finds that said Pacific Co-operative League ever acted as agent or representative of the owners or holders of Loan Capital Certificates either in the management or operation of said stores, or otherwise or at all, and further that said Master erred in finding that the petitioners in said petition in reclamation named were the representatives or the representative of the owners or holders of Loan Capital Certificates, and that said Special Master further erred in finding that the petitioner, to wit: the San Diego Co-operative Association, is entitled to the possession of said three stores either as Trustee for the owners or holders of said Loan Capital Certificates, or otherwise or at all.

28.

Said Ancillary Receiver further excepts to said Conclusions of Law wherein said Special Master finds that the holders of Loan Capital Certificates have any beneficial interest in said stores.

29.

Said Ancillary Receiver further excepts to said Conclusions of Law wherein the Special Master finds that said petitioner, to wit: the San Diego Co-operative



Association, has shown good or sufficient or any reason whatsoever why the prayer of the petition for the order to show cause of the Ancillary Receiver herein should not be granted.

## 30.

Said Ancillary Receiver further excepts to said report wherein it recommends that it be decreed that the Ancillary Receiver has no interest in said three stores and that said Ancillary Receiver is not entitled to the possession of said stores, and said Ancillary Receiver excepts to that portion of the report wherein it is recommended that an order be made delivering said three stores to the representative of the owners and holders of the Loan Capital Certificates.

WHEREFORE, said Ancillary Receiver prays that a day may be fixed for the hearing of the Report of said Special Master and of these Exceptions thereto, and that upon the hearing thereof a decree be made and entered to the effect that Wm. H. Moore, Jr., as Ancillary Receiver herein, is the owner and entitled to the immediate possession of all of the stores described in Schedule A attached to the Petition in Reclamation herein.

W. T. Craig

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Norman A. Bailie

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Attorneys for Ancillary Receiver.

(Endorsed): Filed Jun 26, 1922 Chas. N. Williams, Clerk By Louis J. Somers Deputy



At a stated term, to-wit: the July, A. D., 1922 Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, on Thursday, the twenty-third day of November, in the year of our Lord one thousand nine hundred and twenty-two;

Present: The Honorable Benjamin F. Bledsoe,  
District Judge.

In the matter of the petition of )  
 ) No. F 99 Equity.  
 Meyer Cloak & Suit Co. etc. et al. )

This matter having heretofore been submitted to the court for its consideration and decision, upon the report of the special master and the exceptions thereto, and said matter having been duly considered by the court and the court being fully advised in the premises, it is now by the court ordered that all of the exceptions to the master's report be and the same hereby are overruled and that pursuant to Federal Equity rule 67 there is hereby taxed as against the receiver the sum of \$5.00 for each of such exceptions so taken and overruled, amounting in all to the sum of \$150.00; it is thereupon by the court ordered that the report of the special master be and the same hereby is confirmed and that the property involved, consisting of three grocery stores, be returned to the San Diego Co-Operative Association, as prayed for in its petition therefor; counsel for said Association to prepare the appropriate Order.

(Testimony of Charles Henry Peltcher.)

[TITLE OF COURT AND CAUSE.]

STATEMENT OF EVIDENCE UNDER  
EQUITY RULE 75.

TESTIMONY of CHARLES HENRY PELTCHER for Petitioners.

CHARLES HENRY PELTCHER, a witness produced on behalf of Petitioners, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

My name is Charles Henry Peltcher. I am a plumber, living at 1866 Abbott Street, Ocean Beach. I served on a committee for the purpose of investigating the feasibility of forming a co-operative association at San Diego. The Chairman of the San Diego Federated Trades appointed the Committee. The Committee reported that it would be advisable to organize an Educational Society, which was done. The Society elected a Chairman, Secretary and Executive Committee. The name of the organization was the San Diego Consumers' Co-Operative Association. This was the beginning of the organization that is now known as the San Diego Co-Operative Association. Later we were introduced to representatives of the Pacific Co-Operative League. We had meetings with Mr. A. A. Johnson, a representative of said League some time in April, 1920. Mr. Johnson spoke at a meeting of the San Diego Co-Operative Association, the subject of his talk being "General Co-operation." He told the

(Testimony of Charles Henry Peltcher.)

membership that the funds we would subscribe would be used to purchase a store, and we would "own and control a store in San Diego." He was then addressing members who had not subscribed. Each member subscribed the amount of \$50.00, to be raised as one payment or several payments, these payments to be deposited with the local committee and used to purchase or establish a store in San Diego. It was definitely stated that the \$50.00 subscribed by the membership was to be paid as membership in the Pacific Co-operative League, but I don't know where it was to be deposited. It was positively stated that it was to be for our own benefit and profit; that the \$50.00 was to purchase property that would be the property of the San Diego Association. The \$50.00 subscribed was divided into two parts—one of \$10.00 and one of \$40.00. Ten dollars was to go for an educational campaign. I understood that the balance of the money was to be used in buying membership in the San Diego Co-operative League Store. Mr. Johnson did not tell us at that time just how the deal would be handled. He told us that the members of the San Diego Co-operative League were to buy the stores and were to own them themselves. I had given my subscription before that time. In due time there was issued to me an associated membership certificate in the Pacific Co-operative League. I did not have anything to do personally with the purchase of the stores. I received five per cent. interest from the local stores, as we were told by Mr. Johnson.

(Testimony of John A. Hadland.)

TESTIMONY OF JOHN A. HADLAND for Petitioners.

JOHN A. HADLAND, a witness produced on behalf of Petitioners, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

I came to San Diego on October 13, 1919. I assisted in starting a co-operative organization there. I talked at several meetings and we finally organized the San Diego Consumers Co-operative Association about the 20th of November, 1919. I had met Mr. Ames, who, I understood, was General Manager of the Pacific Co-operative League before I went to San Diego. At this meeting Mr. Ames, President of the Pacific Co-Operative League, spoke to me on the possibilities of doing work on co-operation in San Diego and explained the League plan to me. Mr. Ames stated that the plan of the League was to promote the idea of co-operation throughout the country, to be financed by a \$10.00 associate membership fee which would be collected in any field where the League organized. This \$10.00 associate membership fee would keep or finance his educational institution to train managers to draw from to open up stores; to publish an organ spreading the work of co-operation; to assist or to give advice to branches and stores or any associations opening up on the matter of co-operation. The main theory was to pay to have trained managers to furnish stores when called upon.



(Testimony of John A. Hadland.)

The other tack of the organization of capital was to organize or run the particular stores wherever they happened to be. In some sections these have been organized on \$50.00 basis, some on \$40.00, and some on \$100.00 basis; but in this instance \$40.00 was to be goods on the shelves of the store, or, in other words, the property of the San Diego store, the \$10.00 membership being for services rendered to them by this store.

In addition to that if a store should vote, the rule was at that time a store should vote 25% of its capital stock to a wholesale known as Co-Operative Wholesale Company of San Francisco, a separate organization.

I repeated the statements made by Mr. Ames on the League plan to prospective members at public meetings and personally. I also distributed about fifty copies of the by-laws of the Pacific Co-Operative League given to me by Mr. Ames in Seattle. Later I distributed additional by-laws of the League and other pamphlets explaining the League plan set to me by Mr. Ames after arrival in San Diego. I did not discuss with him the question of a Branch at San Diego. I circulated a paper for subscriptions. The paper had printed on it the following:

"This list is in charge of.....No. 12.  
SAN DIEGO CONSUMERS CO-OPERATIVE AS-  
SOCIATION.

Labor Temple, 621 Sixth Street.

San Diego, California, Jan 26th, 1920.



(Testimony of John A. Hadland.)

We the undersigned hereby agree to subscribe for membership in the San Diego Branch Co-Operative store, and agree to pay thereon the sum of \$50.00 (fifty dollars) in cash or installments on receiving notice of cancellation from Mr. Johnson our BONDED ORGANIZER."

The subscribers to loan capital received a certificate, called a "loan capital" certificate, which was in the following form:

"CO-OPERATION.

Producer

Consumer.

The link that binds.

PACIFIC CO-OPERATIVE LEAGUE, Inc.

San Francisco, California.

Incorporated Oct. 13, 1913. Not operated for Profit.

CERTIFICATE OF LOAN CAPITAL

(without liability)

Receiver of George F. Gray,

(The holder hereby agrees) The sum of Forty &  
(that this Certificate is lia-) 99/100 Dollars \$40.00, as  
(ble to forfeiture in the) Loan Capital. This loan  
(event the holder becomes) capital is to be invested in  
(indebted to the Pacific) the Pacific Co-operative  
(Co-operative League ) League for the use of the  
Co-operative Store at San  
Diego, Calif. in accord-  
ance with the By-Laws of  
the Pacific Co-operative  
League.

PACIFIC CO-OPERATIVE LEAGUE

Ernest O. F. Ames, President.

Attest: W. S. Huntington,

Registrar.

Dated, San Francisco, Cal. Aug. 30, 1920."

(Petitioner's Exhibit 9)

(Testimony of John A. Hadland.)

The subscription blank (Respondent's Exhibit 1) was in the following form:

"PACIFIC CO-OPERATIVE LEAGUE, INC.  
No. 1752.

236 Commercial St., San Francisco.

Affiliated with the National and International Co-operatives, I, the undersigned, in order to assist in the establishment of the Co-OPERATIVE STORE (branch of Pacific Co-operative League), at San Diego, hereby subscribe the sum of \$. . . . . of which \$10.00 is for Associate Membership, and the balance for . . . . . (State whether first payment on loan capital or new loan or installment) for investment by Pacific Co-operative League in said store to be entitled to interest and privileges according to the By-Laws.

I agree to pay of the above amount \$50.00 deposit with this application and the balance as follows:

Amount Paid \$50.00	Signed Chas. H. Peltcher
Associate Member \$. . . . .	Address, Ocean Beach, S.D.
Loan Capital \$. . . . .	

Total \$. . . . . Received by A. G. Rogers,  
A. Johnson,

San Francisco, Cal.

Feb. 14, 1920.

The white copy is the member's official receipt.

The blue copy must be returned to the central office with cash, check or deposit slip.

The yellow copy must be retained by the local store or field representative."

(Testimony of John A. Hadland.)

There was a verbal understanding that they were to receive 5% interest on the \$40.00. I believe they received some of this interest at 5%. It came by check, but I do not recall where it came from. They only received it once.

I do not know anything with regard to the operation of the stores except as a patron of the store. Mr. Ames handed me a copy of the By-Laws of the Pacific Co-operative League and I read them before I talked to the people in San Diego. So far as any statements I made to the San Diego Co-operative Association were concerned, they were taken from the By-Laws. I left San Diego about June 1, 1920, for Alaska in the employ of the Pacific Co-Operative League. I was ordered to Alaska by Mr. Ames and was sent a check for \$50.00 to pay my expenses to San Francisco where I reported to Mr. Ames.

"Page 2—By-Laws Pacific Co-Operative League

Second, the purpose for which this Association is formed is to promote the theory of co-operation and to advance its practical development, to establish a central bureau of information, education, publicity and general service, and to provide literature and lectures; to assist co-operative movement; to act as organizer, promoters, advisers and auditors for Co-Operative Association, and to assist dependent co-operative enterprises to work in unity with one another and to develop a federation of co-operative bodies for mutual advantage."

(Testimony of Charles J. Eason.)

TESTIMONY OF CHARLES J. EASON for Petitioners.

CHARLES J. EASON, a witness produced on behalf of Petitioners, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

I reside in San Diego and my business is that of postman. I am a member of the Board of Directors of the San Diego Co-Operative Association. I was present at a meeting in San Diego in the Labor Temple in February, 1920, at which Mr. A. A. Johnson made a talk. He told us he was representing the Pacific Co-operative League as an organizer; that our affiliations with the League would mean that we would become affiliated with other stores which were affiliated with the League, thereby combining our purchasing power; that the Pacific Co-operative League owned and operated a wholesale store in San Francisco; that we would receive the benefit of their buying, which would be much cheaper than we could buy through our own store without wholesale; that the League had a special system of accounting whereby the League could keep an accurate account of the store's business, an accurate account of the store's stock, and see that the store did not over-buy or stock up the store with goods not salable, and that the finances would be kept account of so that a manager could not default without being discovered; that auditors came from time to time to audit the store, and we would be furnished statements; that the



(Testimony of Charles J. Eason.)

League was educational; that its purpose was to help organize other groups; and by becoming members we thereby further the cause of co-operation in helping to organize other groups; that 25% of the capital was to be subscribed; at such time as there would be sufficient number of stores represented, a wholesale stock would be organized at Los Angeles, and each of the local groups subscribing 25% of their stock would be sufficient to organize a wholesale at Los Angeles and we would benefit from that. He told us that by becoming members of the Pacific Co-operative League we became affiliated with all the Leagues in the United States, and also International.

Money was collected and turned over to Organizer Johnson. That was one of the representations of the League; that it would take care of the finances and funds. The money was to be paid in to the Pacific Co-operative League and when sufficient money was received, it was to be used in buying a store. I was also present at a meeting addressed by Mr. Ames, President of the Pacific Co-Operative League in April or May, 1920, at the Labor Temple; that Mr. Ames spoke about co-operation in this part of the world; that he spoke about the 'Rochdale System', and spoke about the Pacific Co-Operative League being operated under the 'Rochdale System'; he also spoke, I remember, about the 25% of our capital to be invested in a wholesale and explained it by a chart on the board, drawing a circle and showing where at least twenty groups had started stores in some lo-



(Testimony of Charles J. Eason.)

cality, in several different points, and each by paying in 25% of the total capital would establish a wholesale. He also spoke in regard to the management of the store, their having expert managers to protect our interest in buying and accounting, and our finances could be protected. The name of the local organization was the San Diego Consumers Co-operative Association; later it was changed to the San Diego Co-Operative League; later still it was changed to the San Diego Branch of the Pacific Co-Operative League, and later still to the San Diego Co-Operative Association.

The San Diego Co-operative Association is a voluntary association, which has never filed with the County Clerk of San Diego County the necessary papers to show that it was doing business under a fictitious name. The name on the store was "Pacific Co-operative League, San Diego Branch." This name was placed on the stores four or five months after their purchase.

While I was Secretary of the San Diego Co-operative Association, the Association entered into an agreement to purchase certain grocery stores from the Consumers Grocery Company. Said Agreement was in the following form:

**"CONTRACT AND AGREEMENT.**

August 11, 1920:

1. THIS CONTRACT AND AGREEMENT entered into this date between the Consumers Grocery Company, Inc., hereinafter known as the party of the

(Testimony of Charles J. Eason.)

first part, and the San Diego Co-operative Association, party of the second part, Witness:

2. In receipt of \$1,000.00 (One Thousand Dollars) the party of the first part gives the party of the second part an option to purchase the stock and fixtures located at 426 Market Street, 618 Fifth Street and the S. W. Corner of Broadway and Eleventh St.

3. It is understood and agreed by both parties that this option expires in thirty (30) days from this date (August 11, 1920).

4. The party of the first part agrees to sell to the party of the second part the stock of merchandise located in the three stores enumerated in paragraph 2 at the present market price per pound, per dozen, per case or per gallon, at the wholesale jobbers price list of the City of San Diego.

5. Both parties agree to name the following committee of three men, who are in the wholesale grocery business, to price this inventory:

H. A. Floaten, or other representative of the Pacific Co-Operative League.

Charles P. Morse, of Klauber-Wangenheim Company.

H. G. Brohm, of Klauber-Wangenheim Company.

6. Both parties agree to the price that this Committee places on the merchandise as per agreement in paragraph 4.

7. The expense of the work done by this Committee to be divided equally between both parties.

(Testimony of Charles J. Eason.)

8. All insurance, public license, telephone, electric light, gas, rent and or any other prepaid item to be pro rated to the date of the consummation of the purchase.

9. All returnable containers to be taken up in the stock inventory at their cash value, such as barrels, bottles, jugs, cans and or any other items of such nature.

10. Paper bags, paper, wrapping twine, register tape and or any other material necessary to the operation of the grocery business to be taken up in the stock inventory at the present market price per pound, as per the wholesale price lists.

11. The party of the first part hereby acknowledges to the party of the second part receipt of \$1,000.00 (One Thousand Dollars), being payment for the option covered in paragraph 4.

12. At the time this sale is consummated, provided it is consummated within the time limit, it is understood by both parties that the One Thousand Dollars paid in by the party of the second part shall constitute the first payment.

13. It is understood and agreed by both parties that upon payment of an additional \$12,000.00 (Twelve Thousand Dollars) by the party of the second part to the party of the first part, making a total paid in of \$13,000.00 (Thirteen Thousand Dollars), the business of the three stores as enumerated in paragraph 2, will be turned over to the party of the second part.

(Testimony of Charles J. Eason.)

14. It is further understood and agreed that the unpaid balance over a total of \$13,000.00 (Thirteen Thousand Dollars), if there should be any, that the party of the second part will turn over to the party of the first part the total daily cash sales each day until the balance is paid in full; in no event shall the purchase price exceed the sum of \$15,000.00 (Fifteen Thousand Dollars).

15. In the event that the stock and fixtures should inventory less than the amount paid in, namely, \$13,000.00 (Thirteen Thousand Dollars), by party of the second part, the party of the first part will give to the party of the second part a check covering the difference.

16. It is understood and agreed that the fixtures of the three stores enumerated in paragraph 2 shall be included in the inventory at \$5,000.00 (Five Thousand Dollars), the fixtures to be those as shown on the list attached to this agreement.

CONSUMERS GROCERY COMPANY INC.

By Justin W. Hammond

---

Justin W. Hammond  
President.

SAN DIEGO CO-OPERATIVE ASSOCIATION,

By J. N. F. Bischoff Chas. J. Eason.

---

J N. F. Bischoff Chas. J. Eason.  
President Secretary.

San Francisco, Cal.

The above Agreement approved  
this date.

PACIFIC CO-OPERATIVE LEAGUE,

By\_\_\_\_\_."



(Testimony of Charles J. Eason.)

The Agreement is dated August 11, 1920, and was approved by the Pacific Co-Operative League. No person was present when the Notice of Sale, or Bill of Sale was executed except Mr. Hammond and Mr. Floaten. A Notice of Sale was recorded in San Diego County by the Consumers Grocery Company, from whom the three stores were purchased, stating that the Consumers Grocery Company intended to sell the stores to the Pacific Co-Operative League. Later a Bill of Sale was executed by the Consumers Grocery Company to the Pacific Co-Operative League. I subscribed \$50.00 to the Pacific Co-Operative League—\$10.00 for an Association Membership and \$40.00 subscribed as loan capital, to be invested in stores of the San Diego Branch. I received a certificate called a "loan capital" certificate. All who subscribed money in San Diego received certificates in the same form. There was approximately \$20,000.00 subscribed, all together.

I served on a Committee that was appointed by the San Diego Co-Operative Association to investigate the purchase of stores; Mr. Johnson, a representative of the Pacific Co-Operative League, went with us, but he was not an official member of the Committee. We went over the proposition submitted by Mr. Hammond of the Consumers' Grocery Company, and went through the stores. Mr. Johnson was present some of the time.

We also asked that Mr. Floaten, of the Pacific Co-Operative League be sent down to look the stores



(Testimony of Charles J. Eason.)

over, as we felt we were inexperienced and that we would use one of the agencies which the League promised to give us in making a wise selection. As he reported that he thought the stores were a good buy we made a further effort to raise more loan capital, and then entered into negotiations with Mr. Hammond and were finally instructed to sign the contract for the purchase of the stores, which we did.

The following from the Minutes of the Directors meeting of the San Diego Co-Operative League August 9, 1920.

“Organizer Johnson stated: That Mr. Hammond, the proprietor of the Consumers’ Grocery Company’s stores, requested that we give him a definite answer in regard to our intention of purchasing the stores. Mr. Johnson also reported: That up to the present time only \$13,000.00 of the loan capital had been paid in, this amount includes the \$2,000 special loan of the Carpenters’ Union. In view of this fact it will be necessary for the Consumers’ Grocery Company to reduce their stock to \$14,000 before we could purchase it.

“Moved by Director Rogers, seconded by Director Barnes that the entire Board of Directors act as a Committee to make the necessary arrangements for the purchase of the three stores of the Consumers’ Grocery Company, and that the acts of the majority of the Committee be binding. Motion carried.

(Testimony of Charles J. Eason.)

"The President stated that unless objection was made, the consent of the Board of Directors, hereby granted, authorizing the President and Secretary to draw on the Pacific Co-Operative League for \$1,000.00 in favor of the Consumers' Grocery Company, this payment being necessary to the binding of the purchase agreement for the three stores this payment not to be made unless the purchase terms are satisfactory to the Committee. There being no objection it was agreed to.

"Moved by Director Webster, seconded by Director Barnes; that notice be sent to the Pacific Co-Operative League of the purchase of the stores and that they be requested to send a League representative here to superintend their opening. Motion carried."

Mr. Floaten came down and looked over the stores and reported that he thought the stores were a good buy.

The stores were actually paid for by a draft on San Francisco on the Pacific Co-operative League in favor of the Consumers Grocery Company. A telegram was sent by J. N. Bischoff, President of the San Diego Association, to the Pacific Co-operative League requesting a draft for the initial \$1,000.00 payment. The Pacific Co-Operative League did not furnish any capital whatever to purchase the stores. The money on loan capital certificates was paid to Mr. Johnson. It was deposited in the Security Bank in San Diego

(Testimony of Charles J. Eason.)

and was subject to the check of the Pacific Co-Operative League. It was deposited in two accounts there but the Cashier told Mr. Eason that Mr. Ames had told him to have but one account there, and that was without the permission of the San Diego Association or any knowledge on their part whatever; it was supposed to be held in trust by the Pacific Co-operative League for the San Diego Association, subject to their check. The Board of Directors of the local Association discussed legal finances at its meetings and the necessity of the members paying in their loan capital. Two Thousand Dollars was borrowed from the Carpenters' Union. President Bischoff reported a special loan of \$2,000.00 to the League by Local #1296 of the Carpenters' Union. I was not present when the deal was finally closed and the Bill of Sale delivered. I do not know where the Bill of Sale was delivered, or if it was ever delivered. I received one payment of interest on my loan capital certificate.

During the time I was Secretary and Treasurer of the San Diego Co-Operative Association, a dividend or rebate was declared. From the minutes of the members' meeting of the San Diego Association dated February 17, 1921:

"The Board of Directors submitted the following recommendations as to the disposition of the stores' profits for these past four months, and moved their adoption; that out of the sum of \$1,351.74 profit that \$400.00 be set apart for the payment of interest due on the members' loan

(Testimony of Charles J. Eason.)

capital; that the sum of \$47.59 be set apart as a depreciation fund for the past four months; that the sum of \$50.00 be set apart to be used as the educational fund; that \$28.47 be set apart to be used as a reserve fund; that the balance of the store profits amounting to \$825.68 be left in the stores' funds as a special loan to be prorated and credited to each member according to the amount of his or her share in the purchase profit rebate, the stores to pay said members the sum of 5% interest for the use of the same. Motion was made by Dale Smith, and the motion seconded; that the recommendations of the Board of Directors as to the disposition of the stores' profits be adopted and concurred in. Moved by Henry Read, seconded by E. F. Hastings: that this motion be amended so that any member who wishes can draw out his or her rebate on purchases, instead of leaving it in the stores as special loan, may do so. Amendment carried. The question on the original motion as amended was put and the original motion as amended carried."

The following is a copy of the form used in paying interest on Loan Capital Certificates and rebates to members of the local Association:

PACIFIC CO-OPERATIVE LEAGUE

(Signed) Ernest Ames.

San Diego Branch

When Redeemed Manager Must Forward With Daily Report.

(Over)



(Testimony of Charles J. Eason.)

The reverse side of Exhibit reads as follows:

“(1) ADDED CAPITAL

Please place to credit of loan capital  
in my name.

Name .....

---

(2) REDEEMED IN CASH

Name (Signed) Stanley M. Gue.

---

(3) REDEEMED IN MDSE.

Name .....

The second sheet of aforesaid exhibit is in words  
and figures as follows, to-wit:

“#58 To be Cashed at Store only.

---

PACIFIC CO-OPERATIVE LEAGUE.

San Francisco, Dec. 31, 1920.

To the Manager of San Diego Branch.

Pay to, or Credit W. B. Jones.....\$ .17

.....Seventeen Cents .....Dollars.

being in full payment of dividend and interest to  
Dec. 31st.

.....  
: 1. This can be added to members' share :

: 2. It can be taken out in trade by mem- :  
: ber, or :

: 3. It can be exchanged for cash. :

: Member will strike out the line not :  
: wanted and sign here in full settlement. :

: ..... :

: (Over) :

.....



(Testimony of Charles J. Eason.)

PACIFIC CO-OPERATIVE LEAGUE

(Signed) Ernest Ames

San Diego Branch

When Redeemed Manager Must Forward With  
Daily Report

(Over)"

The reverse side of Exhibit reads as follows:

(1) ADDED CAPITAL

Please place to credit of loan capital in my name.

Name .....

---

(2) REDEEMED IN CASH

Name .....

---

(3) REDEEMED IN MDSE.

Name .....

Petitioners Exhibit 16"

An inventory of the stores was taken and afterward the gross profit figured and the expense taken out and the net profit figured. Out of the net profit was deducted such items as depreciation, interest, educational fund and one or two other items, and what was left was pro rated among the members according to purchases and rebated. At no time while I was Secretary did the local Board of Directors authorize the investment of 25% of the loan capital of the Pacific Co-Operative League Stores, San Diego Branch, in any wholesale grocery.

(Testimony of Charles J. Eason.)

The dividend slips for the dividends or rebates I spoke of came from San Francisco. I also received interest on my loan capital investment of \$40.00.

Mr. Kinard was in charge of the local stores for several months. Mr. Huggins succeeded him. Mr. Huggins was sent here by the Pacific Co-Operative League Stores, at the request of two of the Directors of the local Association. The management of the store purchased all the supplies. There was one manager for all three stores. The manager's check for his salary came from San Francisco, as well as the checks for all the other employes. I understand that all money came from San Francisco.

#### ON CROSS EXAMINATION.

Mr. Johnson represented to us that 25% of the loan capital was to be subscribed at such time as there would be sufficient number of stores represented to organize a wholesale store in Los Angeles and each of the local groups subscribing 25% of their stock would be sufficient to organize a wholesale at Los Angeles and we would benefit from that.

Article IV of the By-Laws of the Pacific Co-Operative League reads as follows:

Any person, firm, organization or corporation may become a member of this association by paying the membership fees of \$10.00—which shall also include a life associate membership in the Pacific Co-Operative League. Members shall also pay at least the sum of \$40.00 additional as loan capital, 25% of which shall be invested by

(Testimony of Charles J. Eason.)

the Pacific Co-Operative League, Incorporated, in an incorporated wholesale company, and the balance shall be invested in stores of this association, and by signing the By-Laws of this association.

The following is taken from the Minutes of the Members' meeting of the local Association of September 16, 1920:

"Manager Floaten gave a very interesting talk on the general business situation, stating that a total of more than \$12,000 had been taken in by the three stores during the past fourteen days. He called attention to the fact that some who wish to patronize the Co-Operative store had been drawn to another store nearby and it was suggested that a large sign should be placed to offset this error."

On October 14, 1920, the San Diego Co-Operative Association passed a resolution to the effect that the Consumers Grocery Company signs should be taken down and that they should be replaced with signs reading, "Pacific Co-Operative Stores, San Diego Branch."

On November 12, 1920, said Board of Directors passed a resolution to the effect that the signs on the stores should be made to read, "San Diego Branch Pacific Co-Operative League, Store No. 1," "Store No. 2," "Store No. 3," respectively.

The Minutes of the San Diego Co-Operative Association of December 16, 1920, show that said Associa-

(Testimony of Charles J. Eason.)

tion had come into possession of the sum of \$250.00 through a commission that was obtained from the former owner (Consumers Grocery Company), of the stores for selling the stores. Mr. Eason stated that he was Secretary-Treasurer of the local Association at that time and that said \$250.00 was never turned over to him or the Association; that so far as he knew it was paid back to Mr. Johnson.

After Organizer Johnson left, I collected from different people who were taking up loan capital subscriptions. I gathered those and forwarded them. The money was deposited in the Security Bank in the name of the Pacific Co-Operative League and was subject to check to the Pacific Co-Operative League at San Francisco. The local Association had no right to check on it.

The manager of the stores and the help were paid by the checks of the Pacific Co-Operative League.

It was reported by Mr. Ames that the insurance would be carried by the Pacific Co-Operative League and that expenses would be taken out of our store. I do not know in whose name they were insured.

I resigned as Secretary-Treasurer because of the interference of the Pacific Co-Operative League on our funds, so that I could not keep my accounts in the way they ordered these things handled. It was through San Francisco and that was one reason I resigned.



(Testimony of W. S. Neal.)

TESTIMONY OF W. S. NEAL, for petitioners.

W. S. NEAL, a witness produced on behalf of petitioners, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

I met Mr. A. A. Johnson and was with him when he was soliciting subscriptions for loan capital certificates. I was working for the Pacific Mutual Life Insurance Company and was soliciting, I know many people who were interested in co-operation for public good and not for profit and I introduced Mr. Johnson to these friends of mine. He represented that he was to pay \$40.00 loan capital to be used to purchase goods to put on the shelves; he made that point strong, that we would use our own money to put goods on the shelves and receive the profits ourselves. He went on to elaborate how if we would trade with other merchants we were charged interest on investments, and that by doing this act for ourselves we were enabled to save that profit, which would be distributed among the members, he made it absolutely clear that this \$40.00 loan capital was a loan to be used for this purpose, it was to be owned and controlled and managed by our own people, he dwelt on that and made it perfectly clear and every man he solicited aside from my own case, he stated that the stores would be owned by the people who furnished the money to buy them, they would be owned by San Diego people, owned and operated. Nothing was said about 25% of the loan capital being used for the



(Testimony of Stanley M. Gue.)

purpose of establishing a wholesale grocery. Under certain circumstances we could get our money back in case we went away or anything of that kind. I never received one of the loan capital certificates. I made two payments, but did not make any more.

TESTIMONY OF STANLEY M. GUE for petitioners.

STANLEY M. GUE, a witness produced on behalf of petitioners, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

I have been a resident of San Diego off and on for about fifteen years. I am a member of the San Diego Co-Operative Association. I joined it about the month of November, 1919, I signed a petition that was circulated by the Federated Trades Committee which was organizing the Co-Operative store here. I saw a little sign over one of the stores, which read as follows: "This store is owned by 550 families. Ask the clerk inside how you can become one of them." The sign was put up about one year ago and has been there ever since.

I attended a meeting in San Diego at which Mr. Ames of the Pacific Co-Operative League spoke. Mr. Ames stated that if we would affiliate with their League that they had a wholesale house in San Francisco where we could buy cheaper by affiliating with the combined society than at the local wholesale houses; that after we raised capital and got our store going

(Testimony of Stanley M. Gue.)

they intended to establish a wholesale house in Los Angeles and at that time if we desired we could vote 25% of our capital to apply in establishing the wholesale house in Los Angeles; and he told us at that time we were not incorporated, and he told us the League was incorporated and could handle all matters for us in a legal way. He told us that the League being an incorporated body they were entitled to act as Trustees of our funds and managers of our business in any way that an ordinary bank or trust company might act; and that it would not be necessary for us to go through the formality of incorporating, he told us about what they had done in other towns; that in some places the organization had raised \$25.00 per member for the capital of their store; that in some places fifty and some one hundred. He advised us that we ought to raise about \$50.00 per head for capital in our store and as soon as we had sufficient capital we should go ahead and buy up our store; and he stated that the League, in addition to having the wholesale houses, had trained managers which they could furnish to their federated society and trained auditors, bookkeepers, and efficiency experts; and that they would assess this local society a small part of the actual expense, which would be only a small part of what it would cost us to hire those experts ourselves; that we could get that benefit by affiliating with the League; that they would send an organizer and receive our loan capital and put it in escrow in the bank until we were ready to buy a store, and that they would assist us in

(Testimony of Stanley M. Gue.)

finding a locality; that they had trained men they sent around to investigate those things, and that we could get the best bargain possible in buying out a store. And he told us that they would - that they had book-keepers and by keeping a centralized account they reduced the cost of operation to a minimum, and that they assessed each local group for their share of the expense. He said that the Pacific Co-Operative League operated on the Rochdale plan. I received a loan capital certificate in the same form as that of the others who subscribed for loan capital certificates.

I was a Director of the local Association. I have had the office of Secretary and Treasurer. I was elected in October 1921. Mr. Huggins, Manager of the Pacific Co-Operative League Stores, was present at several of the meetings of the Board of Directors of the local Association.

I did not receive any dividends or interest from any other store or branch of the Pacific Co-Operative League other than the San Diego branch.

There are about 575 members on the books in my possession. They are not all fully paid up. There are about 520 or 530 fully paid, the balance have only small interests in the business, twenty or twenty-five dollars. They have not paid their full \$40.00.

I got 5% on \$40.00 invested and a rebate on my purchases, according to the amount of the profit, which were figured by our local Board of Directors and proportioned to the members according to their purchases. I got a draft of 17¢ interest from the Pacific Co-

(Testimony of Mrs. Bertha Gleason.)

Operative League payable from the San Diego account. Later I got a draft or check or memorandum for my rebate on purchases. I aided in taking inventory of the local stores once. Our local Board takes inventory every six months, in order to find profits to be paid back to the members. The Managers of the local stores usually attended the meetings of the local Association and made a report of the business, etc. While I was Secretary-Treasurer of this local Association it has never been called upon directly to pay any of the debts of the Pacific Co-Operative League at other places.

Minutes of meeting of the San Diego Association, December 15, 1921. These Minutes show that the Pacific Co-Operative League was discharged as Trustee for the local Association; that new Trustees were appointed and that name was changed from the Pacific Co-Operative League, San Diego Branch to the San Diego Co-Operative Association. Also that Mr. Huggins the Manager appointed by the League, was present.

TESTIMONY OF MRS. BERTHA GLEASON  
for petitioners.

MRS. BERTHA GLEASON, a witness produced on behalf of petitioners, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

I live at #546 Sixteenth Street, San Diego, California. I am a member of the San Diego Co-Opera-



(Testimony of Charles J. Mays.)

tive Association. I became a member in 1919 through the organization that was started in the Labor Temple through the Federated Trades. I paid \$60.00 I was interested in the co-operative movement, having read and studied it previous to the formation of the San Diego Co-Operative Association. I paid \$10.00 when the organization was started in the Labor Temple, and \$40.00 loan capital. Afterwards I paid \$10.00, \$5.00 a month, to buy coupons for the upholding of the organization. I was informed that we were undercapitalized and to save our business we would have to subscribe more capital. I paid the \$10.00, I am not sure whether to Mr. Berry or Mr. Barnes, one of them was acting Secretary at that time. \$10.00 was to be used for our individual store in San Diego. The money was not to go out of San Diego. When I paid my \$40.00 I understood that 25% of it was to go to the establishment of a wholesale grocery in Los Angeles. .

TESTIMONY OF CHARLES J. MAYS for petitioners.

CHARLES J. MAYS, a witness produced on behalf of petitioners, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

I live at #3586 Falcon Street, San Diego. I am a member of the San Diego Co-Operative Association. I am Secretary-Treasurer. I never performed any duties as Treasurer. No dividend was declared by the local Board while I was Secretary. Dividends



(Testimony of Walter Huggins.)

were paid out of the proceeds of the local store based upon the amount of the purchases by individual members in comparison with the total purchases of members after a given period from the time the store was opened in September 1920, that it was a sort of rebate on the amount of their purchases. I do not know whether or not 25% of the loan capital was authorized to be invested in a wholesale grocery. During the time I acted as Secretary-Treasurer or Director of the local Association, the Board of Directors did not authorize the investment of 25% capital in any wholesale grocery. The same printed form was used in the payment of dividends, and interest on the Loan Capital Certificates to members. Mr. Kinard was the first manager of the stores. He was acting as Treasurer for Mr. Hammond before the purchase. He served for several months. He was succeeded by Mr. Huggins who was sent by the Pacific- Co-Operative League, and as I understand it, at the request of two Directors of the local Association.

TESTIMONY OF WALTER HUGGINS for petitioners.

WALTER HUGGINS, a witness produced on behalf of Petitioners, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

I occupied the position of Manager of the Co-operative Stores in San Diego, commencing my services the last week of February, 1920. I continued until the

(Testimony of Walter Huggins.)

stores were taken charge of by the Sheriff in February, 1922. I had charge of the purchase of goods for the stores. A few were purchased in Los Angeles, nine-tenths were purchased in San Diego. All goods purchased from wholesalers were paid for by money out of the retail trade. The bills were paid by check in San Diego; the checks were drawn on funds in the San Diego Bank, on funds I placed there. It was the custom of the store to extend very little credit but we had two or three exceptions, a city account and a boat account which amounted to about \$1,000.00 per month. The local Board of Directors authorized this credit. I was employed by Mr. Ames in San Francisco. I attended all the meetings of the local Board. I was present when the By-Laws of the local Association were changed on December 15th, 1921. My salary was paid by the young lady cashier in the store. The bank account stood in my name since February 7th, 1922, when an order was made in the Superior Court of San Diego County impounding the money in my hands. Prior to that time the account was in the name of the Pacific Co-Operative League at all times and I signed the checks on instructions from San Francisco as Manager of the Pacific Co-Operative League. I furnished a Fidelity Bond as Manager of the store. The Bond was in favor of the Pacific Co-Operative League in San Francisco.

I made daily reports to the Pacific Co-Operative League in San Francisco, of the business done in the San Diego stores. I made monthly reports to the

(Testimony of Walter Huggins.)

Board of Directors of the local Association in San Diego. We did a small amount of credit business and sent monthly statements to our debtors. The statements were sent on the billheads of the Pacific Co-Operative League. I paid bills on instructions from San Francisco. Later they made a change and instructed me that all bills would be paid in San Francisco and not in San Diego, except the small daily bills. Prior to that I paid the bills by checks of the Pacific Co-Operative League signed by myself as Manager. I never received instructions with regard to payment of bills from anyone else except the San Francisco office of the Pacific Co-Operative League. The subject of my taking orders from the local board was never mentioned by the San Francisco office of the Pacific Co-operative League. The Pacific Co-operative League in San Francisco hired me and told me to come down and take charge of these stores and to make daily reports to them and make deposits in the Bank in the name of the Pacific Co-operative League, subject to my check as Manager. All bills which I received for goods purchased for the local stores on credit came to the Pacific Co-operative League. At almost every meeting of the Board of Directors of the local organization there were bills for sending notices out to members, for hall rent and for meetings of members, which they authorized me to pay. I paid them out of the funds of the store.

Most of the out of town purchases for the stores were made in Los Angeles. For a time I was the

(Testimony of Walter Huggins.)

only person who could sign checks on the bank account in San Diego, but about three months ago the Pacific Co-Operative League made a change and bills were to be paid in San Francisco. About the 7th of February, 1922, I started to deposit money and it could be drawn in San Francisco only. I forwarded the funds to San Francisco. In the first few months after I came to San Diego we sent the money regularly to San Francisco. I did not have to have the O. K. of the San Francisco office before paying local bills.

With regard to my salary, I got notice from San Francisco the 1st and 15th of each month, telling me to draw my salary. I then handed this notice to the cashier and she would pay me. The sign on the Broadway store was there before I came, and remained there.

“Petitioners Exhibit #6

“TO REDUCE THE COST OF LIVING  
THIS STORE OWNED AND OPERATED BY  
500 FAMILIES

Ask the Clerk how you can join them.”

The Pacific Co-operative League owes money for goods delivered to the San Diego Store, purchased during the time I was in charge of the store. Some of these debts have not been paid. I do not know about the rest. I sent most of them to San Francisco when they asked for them a couple of months ago. To my knowledge they have not been paid. I do not believe they have. I do not know if any creditors of the



(Testimony of Walter G. Gastil.)

local stores have filed claims in the Bankruptcy Court; several told me they had not, none told me that they had. My instructions to deposit the money coming from the store in the Bank in San Diego and to draw checks against it came from San Francisco, from the office of the Pacific Co-operative League. The President of the Local Board of Directors was with me when I opened the account in the Bank in San Diego. It was upon instructions from the Pacific Co-operative League in San Francisco, I believe.

TESTIMONY OF WALTER G. GASTIL for Petitioners.

WALTER G. GASTIL, a witness produced on behalf of Petitioners, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

My name is Walter G. Gastil. I am a wholesale grocery salesman employed by the Southwestern Grocery Company. I called on Mr. Huggins under the direction of our Credit Manager, and asked him where and by whom the bills would be paid and how often. Mr. Huggins stated the bills would be paid in San Diego; that they had a bank account down here, and that he would pay the bills each week. Mr. Huggins told me that the only connection between the local stores and Pacific Co-operative League was for buying purposes.

Petitioners Exhibits - various articles appeared in the Pacific Co-operator, the official organ of the Pacific



(Testimony of Walter G. Gastil.)

Co-Operative League showing the League plan of operation. Most of these articles were written and signed by Mr. Ames, President of the Pacific Co-Operative League.

Petitioners Exhibit #14 - Pacific Co-operator March 1921, Article by Mr. Ames. "The Pacific Co-Operative League adheres to all the fundamental principles of the Rochdale system, briefly the plan of operation of the Pacific Co-operative League is as follows: In a local group, desirous of organizing a store it consults the home office of the Pacific Co-Operative League in San Francisco as to the minimum membership and capital required. Having been advised it usually obtains the assistance of a trained, salaried instructor to address meetings which assist local committees to secure the members and to raise the capital. The funds are deposited in trust with the Pacific Co-operative League and members credited. In addition to the capital subscribed, members are required to pay a \$10.00 Association membership fee. This fee is used by the home office to pay the incidental organization expenses, subscription to the official monthly organ, the Pacific Co-operator, and to help defray expenses of general education work, of dues to the International Co-Operative Alliance, etc., a federated plan of the League as distinguished by modified form of federation. Local groups are autonomous, in that the responsibility for success or failure rests squarely on them. They are not autonomous in that they are not independent of other groups but are obliged to

(Testimony of Walter G. Gastil.)

work in unity with the plans outlined by the combined groups of the Association. On the same principle, that the State of New Jersey is not autonomous political and geographical entity but an integral working part of an association of states, so a branch of the Pacific Co-Operative League is a unit in the federation of co-operative societies combined for mutual protection and progress.

Petitioners Exhibit #12, the Pacific Co-Operator, December 1920 on front cover page. "The general work of the League consists of educating co-operators when they desire organizing into stores, groups and industries, and federating them for the development of better mutual service between producer and consumer, and the other accomplishment of the International Co-Operative Commonwealth. Experienced and capable advice offered to those wishing to organize for such purpose. Secure the best advice possible for starting a new Co-operative organization.

"Pacific Co-Operator, July 1920, Page 100. "It is the general plan to deposit the funds collected for store establishment in a local bank to be held in trust by the League for the purpose for which it is subscribed."

"Pacific Co-Operators, December, 1920, Pages 192-193, "San Diego at the advice of the League spent a long time in preparing for its business career. Some may have been a little impatient with the delay but that is now forgotten and it is a long career ahead. The Board of Directors headed by President Bischoff is displaying the special business ability in the admin-

(Testimony of Walter G. Gastil.)

istration of its affairs with frequent meetings of the Board, prompt attention to business by Committees, its ample material with which to meet the members at their monthly meetings."

Petitioners Exhibit #24, Pacific Co-Operator, February, 1920, Page 17. "Legislative. There is a warm diversity of practice about where the boundary line comes between the Directors and the Manager. I think it can be explained. In general, the Board of Directors and the members behind them, is the legislative body concerned with the general policy of the organization, ascertaining this policy and announcing it and then putting it up to the management to carry it out. The management therefore becomes the administrative body of the society." This article was written by Mr. Ames.

Petitioners Exhibit #25. This is a letter from Templeton Johnson to the Local Association inquiring as to the repayment by said association of the money borrowed from him.

Petitioners Exhibit #21. Mr. Dobbs, Assistant to the President and General Manager of the Pacific Co-Operative League stated in a letter to the Local Association with reference to a loan of money from Templeton Johnson, that this is a matter to some extent for local judgment. "The League is not permitted to issue any notes."

Petitioners Exhibit #21, another letter to the Local Association by Mr. Dobbs stated with reference to the

(Testimony of Walter G. Gastil.)

return of loan capital, "we understand that we cannot return loan capital without request from the Board of Directors, we will be guided by your decision in this matter."

Petitioners Exhibit #21, a letter from Mr. Dobbs to Mr. Eason as Secretary of the local Association, reads as follows:

"Mr. Charles A. Eason, Sec.

2463 F. Street,

San Diego, Calif.

Dear Sir:

I have yours of the 23rd and attached thereto bill of expenses from July 1 to August 19, including several items of stationery, etc., which I presume are for use in maintaining proper records in connection with your association.

It is a little irregular to pay these bills from this office as same should be referred to the Board for approval and then submitted to the Manager of the store who will pay same and charge to expense. However, I am inclined to overlook our regular procedure in that this bill covers an extended period of a month a half and enclose herewith check for the amount, charging same to your society.

Yours sincerely,

PACIFIC CO-OPERATIVE LEAGUE

Per H. H. Dobbs,

Assistant President"



(Testimony of Walter G. Gastil.)

Petitioners Exhibit #21, another letter from Dobbs to local association. He states that he is making a personal appeal to the Board of Directors of each of the operating groups to permit him to draw within the next six months, part of the surplus of the League's operating stores for the actual expense incurred by Mr. Ames' trip to Cleveland which will not exceed \$12.00 per store or group.

Petitioners Exhibit #21. This is a circular letter sent out by the Pacific Co-Operative League addressed "To the Firms with Whom we are Doing Business." It states that the Pacific Co-Operative League has been doing business for the past eight years, it has been operating under the co-operative law without capital stock, its capital has been raised by membership payments of which it has close to one-half million dollars.

By-Laws. "Article 9, Section 3, Operation of branches.

In order to permit the operation of branch stores by association members as provided in Article 2, Section 2, it is hereby provided that the Board of Directors may, upon request from a group of associate members, order a survey of any district selected for a branch store, to be made, decide the number of members and the capital required to operate such branch."

The By-Laws further state the method of returning loan capital. That upon dissolution of the stores the money is to be returned on a pro rata basis, also that no stores will be allowed to go into debt.



(Testimony of Walter G. Gastil.)

Minutes of meeting of the Board of Directors, San Diego Association, December 2nd, 1920.

"President Bischoff called Director Sibert to the chair, and upon taking the floor made the following motion, which was seconded by Director Rogers, that it is the sense of the Board of Directors that during the month of December, Mr. Max Gautman be continued as a tenant in the Fifth Street store, upon condition that the section of the store now occupied by him be kept in a more presentable condition than has existed during the past three months and if at the end of this period no improvement is noticed that he be notified on December 31st to vacate. Motion carried.

"Moved by Director Sibert, seconded by Director Rogers: That Director Barnes be delegated to repair and adjust the doors of the Broadway store. Motion carried.

"The Board of Directors now being in executive session the chair called for the reading of T. J. Golden's letter requesting refund of the \$25.00 paid by him on loan capital and stating that he was in need of every cent of money which he could raise; owing to his wife's continued sickness and the expense attendant upon a second surgical operation necessary to her recovery. Moved by Director Rogers, seconded by Director Sibert that the \$25.00 paid by T. J. Golden on loan capital be refunded to him and the secretary be instructed to so notify the central office. Motion carried."

(Testimony of Monott Romaine,)

TESTIMONY OF MONOTT ROMAINE for petitioners.

MONOTT ROMAINE, a witness produced on behalf of Petitioners, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

I am Trustee of the local Carpenter's Union in San Diego. The San Diego Co-Operative Association asked the Carpenters' Union for a loan of money to put into the Co-Operative stores as loan capital. They asked for \$1,000.00 for one year, to draw 5% interest, and another request for a permanent loan. The request was made by Mr. Johnson, the local organizer. I was not the Trustee when he made the application. I went into office right after that. The money was paid over: \$1,000.00 was paid back, that was loaned for one year. The money was paid back in weekly installments of \$100.00 by Mr. Huggins. I believe Mr. Bischoff brought some over at times to the financial secretary himself. I believe the permanent loan was in the shape of loan capital to the Pacific Co-Operative League. Later this \$1,000.00 of loan capital was changed into stock in the Pacific Co-Operative League Stores. The Carpenters' Union has no loan capital certificates now. The Carpenters' Union loaned \$1,000 more and received what were called "Baby Bonds", in denominations of \$5.00, \$10.00 and \$20.00. This made \$2,000.00 which was turned into stock in the Pacific Co-Operative League Stores, Inc.

(Testimony of Carl O. Retsloff.)

TESTIMONY OF CARL O. RETSLOFF for petitioners.

CARL O. RETSLOFF, a witness produced on behalf of petitioners, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

I am Secretary of the Wholesalers Board of Trade and Credit Men's Association of San Diego. I have in my possession some correspondence with reference to collections and credit information on the Pacific Co-Operative League. I undertook to obtain credit information with regard to the Pacific Co-Operative League at the request of San Diego creditors. Among them were the Southwestern Grocery Co., Klauber-Wangenheim Company, Simon Levi Company, Wellman Peck Company, Nason Company and Doyle Barnes Company. I communicated with Mr. Huggins and asked him to give me a financial statement. I received a letter from Mr. Huggins which reads as follows:

"Wholesaler Board of Trade and Credit Association, San Diego.

Gentlemen:

Your communication received to *fill*, and have mailed it to our office in San Francisco as we have sent all inventory matter there. Have asked them to mail information to your office.

Yours very truly,

Walter Huggins, Manager."

(Testimony of A. A. Johnson.)

My recollection is that I made a copy of Mr. Huggins' letter and sent it out with credit information. I received a reply from the Pacific Co-operative League in San Francisco.

TESTIMONY OF A. A. JOHNSON for Respondent.

A. A. JOHNSON, a witness produced on behalf of Respondent, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

My name is A. A. Johnson. I reside in Oakland, California. I am now an organizer of the California Water & Power Company of the State of California, acting for Walter Spreckels.

I was at one time employed by the Pacific Co-Operative League, and in the course of that employment I came to San Diego. I was there from February 7th, 1920, to September 18th, 1920 and from January 9th, 1921 to March 19th, 1921. I was an organizer for the Pacific Co-Operative League. My duties were to solicit memberships and loan capital subscriptions for the League. I occasionally addressed meetings of prospective investors of loan capital. I did not have any specific conversation with Mr. Peltcher with regard to what was to be done with the loan capital subscriptions, only as one of a group in meetings I addressed. I made general talks at meetings. I remember one in February, 1920, at the Labor Temple in San Diego. I stated at the meeting that



(Testimony of A. A. Johnson.)

loan capital subscriptions were to be invested in stores by the Pacific Co-Operative League, to be opened in San Diego for the benefit of the people there. I stated that the loan capital paid the Pacific Co-Operative League was for investment in stores in San Diego. The question as to who should own the stores was not brought up. I did not state at any time to Charles H. Peltcher that the San Diego Association would own and control the San Diego store. I told them it was my understanding of the plan that there was to be a chain of stores coming under one head and operated on the Rochdale plan; that every member got interest on the money invested in the business and got a rebate on purchases according to the amount his purchases bore to the total amount purchased by other members in the organization. I explained that the Pacific Co-Operative League had entire management of the business and the local Association had nothing to do with the business; that was a strong argument for the Co-Operative League plan, that it had a centralized plant and business management and that the business was managed by people who understood the business, and not run by local individuals who knew nothing about the operation of a grocery business.

I did not in the month of February, 1920, state to Mr. Eason that the San Diego Co-Operative Association would own and control the stores in San Diego. I had a great many conversations with Mr. Eason during the month of February.

All the money that I collected for loan capital sub-



(Testimony of A. A. Johnson.)

scriptions was deposited in the Bank in San Diego in the name of the Pacific Co-Operative League. I deposited each week. I did not state at any of these meetings where this money was to be deposited or in whose name.

I was in San Diego at the time the stores were purchased. Mr. H. A. Floaten negotiated for the purchase of the stores. Besides Mr. Floaten and myself the local Directors - Mr. Bischoff, Mr. Eason, Mr. Barnes and others - had something to do with the negotiations. I had a conversation with Mr. W. S. Neal in the Oxford Hotel, San Diego, some time during 1920, I do not know the month. I told Mr. Neal that he was joining the Pacific Co-Operative League and making the loan capital investment for use in the San Diego stores. The question as to who would own and control the San Diego stores was never raised by Mr. Neal.

I had a conversation with Mr. Stanley M. Gue between February and April, 1920

I spoke at several meetings. I explained that those subscribing for loan capital were not stockholders in the chain of stores; that there was no stock in the stores, but that they were simply loaning money for investment in the stores and would receive interest on the money and dividends according to purchases; that is to say, from the purchases they made in the stores on the basis of rebate. I kept no account of the money I raised. I only deposited it in the Bank and the deposit slip was mailed to San Francisco. I kept no

(Testimony of A. A. Johnson.)

track of it. I think I received subscriptions for approximately \$16,000.00 or less. Each week I deposited in the Securities Savings Bank in San Diego and mailed one slip to the San Francisco office, and all accounts were kept up there.

### CROSS EXAMINATION

I very often made these statements in soliciting subscriptions for loan capital certificates: That the local Board of Directors would have no control of the business whatsoever.

Sometime in the month of May, 1920, Mr. Ames came down to San Diego and I took him in my Franklin and drove around town looking at possible sites for stores, and we went through the Consumers Grocery Company and other locations, and Mr. Ames said if he could find nothing better he would buy it if he could buy on the right basis. Later in July Mr. Floaten was sent here to investigate the proposition of the Consumers Grocery Company, with a view to making report. He was sent from the San Francisco office, I believe. During the month of August, I believe the 11th of August, an agreement was drawn with Mr. Hammond (owner of the Consumers Grocery Co.) and the local people here that we purchase the store subject to approval by the League. Mr. Bischoff and Mr. Eason signed the agreement. Mr. Bischoff, Mr. Barnes, Mr. Rogers and Mr. Eason were present at the time the agreement was made and en-

(Testimony of J. N. Bischoff.)

tered into. They were Directors of the Local Association.

I made a statement at the meeting at which I spoke, that a life co-operative associate membership in the Co-operative League was to be given to those who subscribed \$10.00. They were also to have the privilege of purchasing or buying through the direct order department and a year's subscription to the "Pacific Co-Operator," a magazine published by the League, and that they would become automatically members of the local Association. There was no statement that this \$10.00 went to train managers and expert men to handle the business in these stores. I told the people they would get 5% interest on their loan capital from the earnings of the stores at San Diego. The \$40.00 represented by the loan certificates was to be an indeterminate loan. It was to be returned on dissolution of the stores. I made a report on the Consumers Grocery Company to both the San Francisco office and the local representatives here. I read the By-Laws of the Pacific Co-Operative League before coming to San Diego. I was familiar with their contents.

TESTIMONY OF J. N. BISCHOFF for Respondent.

J. N. BISCHOFF, a witness produced on behalf of Respondent, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of J. N. Bischoff.)

I reside in San Diego, California. I have resided there off and on since 1906. I am a Civil Engineer with the United States Navy Department. I am employed as General Foreman of Construction at the Naval Air Station at North Island, and have been so employed since 1919. I have been with the Navy Department for eighteen years. I know Mr. Ames, President and General Manager of the Pacific Co-Operative League. I also know A. A. Johnson and Mr. Hadlon. I was elected as an officer of the first Co-Operative Association which was formed in San Diego.

As a member of the Federal Employees Local No. 53, I was appointed a member of a committee to investigate the movement on foot in San Diego to form a co-operative association in the latter part of 1919 or the early part of 1920, during the time Mr. Hadlon was here and before Mr. Johnson arrived. I went down to the Labor Temple and saw Mr. Hadlon and asked him to give me such information as he had in his possession relative to the organization which was in process of formation, asking him some pointed questions relative to this organization, so that I could make a definite and intelligent report to my organization. I asked him if it was to be a group of individuals, a local organization not in any sense affiliated with any movement, or if it was to be broader in scope. Mr. Hadlon replied that it was a movement, that it was a part of the Pacific Co-Operative League, which organization had a number of branches or stores scat-



(Testimony of J. N. Bischoff.)

tered throughout the western part of the United States. Mr. Hadlon told me he was not a representative of that organization. He did not have a copy of the Constitution or By-Laws of that Association. I made a report to my organization and later attended several meetings of that organization, which was then in process of formation, in the Labor Temple. Mr. Johnson spoke at a meeting in the early part of 1920 at the Labor Temple. Mr. Peltcher was there, but I do not know whether Mr. Eason, Mr. Neal, Mr. Gue, Mrs. Gleason or Mr. Mays or Mr. Romaine were there.

Mr. Johnson said the Pacific Co-Operative League was an incorporated body, incorporated under the corporate laws of the State of California; that it had a number of branches throughout the Western part of the United States and went on to state that he was their representative and was accepting applications for membership in the Pacific Co-Operative League on the basis of \$50.00 per member, \$10.00 of which would be for a life associate membership in the League and \$40.00 for loan capital. He told us the loan was to be used by the Pacific Co-Operative League in the purchase of stores in San Diego. Probably a month later Mr. Johnson stated that in the future 25% of the loan capital would be aside for the purpose of a wholesale store to be established, presumably in Los Angeles. Mr. Johnson did not make any specific statement to me as to the ownership of the stores.



(Testimony of J. N. Bischoff.)

The money collected was deposited in the Bank to the credit of the Pacific Co-Operative League, who drew on it as necessity arose. Mr. Johnson said that this money was to be repaid to the individuals only on certain conditions, which are defined in the Constitution of the League. All subscriptions to loan capital were made as individuals.

I attended a meeting on or about the 31st of December, 1919, at which Mr. Ames spoke. Mr. Ames spoke of the co-operative movement in England, and the methods of the Pacific Co-operative League. Mr. Ames said, to the best of my recollection, that the subscriptions of the individual members were on the basis of \$10.00 for life associate membership and \$40.00 loan capital, saying that had been decided on in San Diego; that at some stores the loan amount had been less and it had been found that less than \$40.00 was not sufficient for operation of the business.

Mr. Ames made several visits to San Diego during the period of organization. He stated that the stores were to be operated from a central office, as it was termed. They would furnish the necessary managers, necessary bookkeeping systems, necessary auditors; that the accounts of the individual stores were to be kept at the central office; that the business was to be done at the central office through the local manager, and the local manager to make payments as authorized through the central office.

All the money collected in San Diego was paid to the representative of the League, Mr. A. A. Johnson,

(Testimony of J. N. Bischoff.)

and deposited in the Bank. To my knowledge, none of the money was deposited to the credit of the San Diego Co-Operative Association.

The election of the Board of Directors of the San Diego Co-Operative League was in June, 1920, I believe. Walter Barnes, Grant M. Webster, Mrs. Nora White Simpson, Rev. Bard, John S. Seibert, Charles J. Eason and myself were the members of the Board of Directors. Mr. Ames came down to San Diego the early part of 1920, around April or May, for the purpose of looking over the ground relative to establishing a store or stores in San Diego. The Board of Directors of the local organization and Mr. Johnson, a representative of the Pacific Co-Operative League, opened negotiations for the purchase of these three stores from the Consumers Grocery Company. There were present when the contract was signed, Justin H. Hammond, A. A. Johnson, Grant M. Webster, Eason, Barnes, Rogers, Mr. Kinard and myself. Mr. Kinard was at that time an employe of the Consumers Grocery Company and a part owner of that establishment. The agreement is made out in the name of the San Diego Co-Operative Association and at the bottom of it there appears a clause - "subject to the approval of the Pacific Co-Operative League." Mr. Hammond asked us if we had full power to execute the contract. Mr. Johnson and myself stated that it must have the approval of the Pacific Co-Operative League before it was of any effect. Mr. Justin Hammond asked members of the Board of Directors if they had full

(Testimony of J. N. Bischoff.)

power to execute an instrument of this kind, and the reply was made by Mr. A. A. Johnson and myself that the agreement must have the approval of the Pacific Co-Operative League before it was of any effect.

After the agreement was signed, it was forwarded to the Pacific Co-Operative League at its headquarters in San Francisco. The Pacific Co-Operative League affirmed the contract by telegram. A draft for \$1,000.00 was drawn on the Pacific Co-Operative League by myself as President of the local organization and by Mr. Eason as Secretary, and the draft was honored. After that Mr. Harry Floaten, who was the District Manager of the Pacific Co-Operative League, came down here. To my knowledge the San Diego Co-Operative Association never had the stores insured in its name; neither did the San Diego Co-Operative Association pay any taxes on these stores.

Mr. Harry Floaten was in charge of the stores. He was not employed by the Board of Directors of the San Diego Co-Operative Association, to my knowledge. The Board of Directors did not at that time nor at any other time give to Mr. Harry Floaten any orders with regard to the management of the stores. There was a discussion in the Board of Directors of the local Association while Mr. Floaten was in San Diego as to whether or not the local Board of Directors of the San Diego Association had the right to give orders to the Manager of the Store. There were present Mr. Harry Floaten, Mr. Kinard, Mr.

(Testimony of J. N. Bischoff.)

Barnes, Mr. Rogers and myself. The conversations took place in the office of the Market Street store about October, 1920. There was a discussion as to whether or not the local Board had any jurisdiction over the store. The question was brought up by Mr. Barnes. Mr. Barnes asked if there were to be any directions given to the management of the store by the Board. I made the statement at that time that he looked at it from this angle, when he went on the job as boss, he expected to have the authority to hire and fire any men employed on that job, and I was willing to give the same right to any Manager employed for the purpose of operating these stores. The question was not raised as to whether the authority over Mr. Floaten came from San Francisco or the Local Board. Mr. Floaten was here two or three months. Mr. Floaten said that the Local Board of Directors had no authority. Mr. F. S. Kinard became Manager after Mr. Floaten. Neither the Local Board of Directors nor any member thereof, nor any official or officers of the San Diego Association had the right to check against the funds of the Pacific Co-Operative League or the Pacific Co-Operative League, San Diego Branch.

The only time that the Local Board of Directors gave any instructions to the Local Manager to pay any bills was once when they directed him to pay for painting signs on the front of the three stores. The Board authorized the payment of some minor bills for the holding of educational meetings and social enter-



(Testimony of Walter Barnes.)

tainments. The Pacific Co-Operative League, San Diego Branch, had approximately 530 members, not all of them were fully paid up. About July, 1921, I received information as to the formation of the Pacific Co-Operative League Stores, a corporation. The plan was to convert the loan capital certificates into stock in the Pacific Co-Operative Stores, Inc. The Pacific Co-Operative League sold the stores to the Pacific Co-Operative League Stores, Inc. To my knowledge 275 members of the San Diego Co-Operative Association, or Pacific Co-Operative League, San Diego Branch, converted their loan capital certificates into stock in the Pacific Co-Operative League Stores, Inc. Most of them received certificates of stock. The loan capital was to be used by the Pacific Co-Operative League for organizing a store or stores in San Diego. I do not know how much money was raised on the loan capital certificates.

TESTIMONY OF WALTER BARNES for Respondent.

WALTER BARNES, a witness produced on behalf of Respondent, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

I am a carpenter and reside in San Diego. I was temporary Secretary of the San Diego Consumers Association. I was also on the Board of Directors of the San Diego Co-Operative League. There were apparently four different names-the San Diego Co-



(Testimony of Walter Barnes.)

Operative Consumers Association, the San Diego Co-Operative League, the Pacific Co-Operative League-San Diego Branch, and the San Diego Co-Operative Association, and I was a member of the Board of Directors of all of the organizations excepting the first temporary organization.

I know Mr. Hadlon, Mr. Johnson and Mr. Ames. I was present at a meeting at which Mr. Hadlon spoke. I do not remember the date, but in the fall of 1919. He talked in a general way about the benefits to be derived from organizing a co-operative store. He brought out the fact that the object of the Pacific Co-Operative League was that \$10.00 was to be set aside for membership in the League and \$40.00 was for loan capital. I think Mr. Hadlon did not make any statement so far as the ownership of the stores was concerned. Mr. Hadlon stated that he was here in the capacity, I think of an educational or advisory or propaganda capacity, and if later on we so desired, a representative would be sent; that he was not here as District Manager or Organizer; that later a man would come down for that particular work. Later on Mr. Johnson came. He talked at a meeting in the Labor Temple; I do not know whether Mr. Neal or Mrs. Gleason were there. Mr. Johnson said the loan capital was to be handled by the Pacific Co-Operative League in the purchase of stores in San Diego. The money was to be deposited in the Bank to the credit of the Pacific Co-Operative League and they were to use it to open stores in San Diego. I did not hear

(Testimony of Walter Barnes.)

Mr. Johnson make any statement to the effect that the stores would be owned and controlled by the persons who subscribed the loan capital.

I heard Mr. Ames speak in San Diego. I never heard him make a statement that the stores in San Diego would be owned by the people who subscribed the loan capital certificates. He stated that the procedure would be that the money would be loaned to the Pacific Co-Operative League, the \$40.00 at the rate of 5%, I believe that was the rate he said, and I am judging this from what we had been discussing. Before the \$50.00 was decided upon, we had been talking about a branch, but he said it would be prorated, and \$10.00 would be for a life membership and the balance for loan capital in the League for the purpose of purchasing stores at various places, and the same plan would be adopted here in case the group decided to affiliate. He stated the Manager would be furnished under bond and every clerk hired under bond and paid by the League.

I was present when the contract for the purchase of the stores was signed by the President and Secretary. I did not sign it myself. A discussion came up at that time by Mr. Hammond, or Mr. Johnson or Mr. Kinard, or some of the three. Mr. Hammond wanted to know if the local Board of Directors had authority to conduct negotiations and stated it would have to go through proper channels so far as the League was concerned; that it would have to go before the League in San Francisco. I did not have any-

(Testimony of Walter Barnes.)

thing to do with the purchase of the property after that.

I acted on the Board of Directors. After the agreement to purchase was signed the Board of Directors had a discussion with Mr. Hammond with reference to price and cash payment. I think Mr. Hammond himself said that a certain stipulated payment should be made and the balance out of the proceeds of the first sales. The Board of Directors did not have anything to do with the purchase, to my knowledge, after Mr. Floaten came down here. The Board of Directors did not give any instructions or directions with regard to management of the stores. They did not pay the Manager's salary; he was not bonded to them; the property was not insured in the name of the San Diego Co-Operative Association; the San Diego Co-Operative Association did not hire any of the clerks. Mr. Hadlon and Mr. Johnson both stated if the money was loaned, it would be drawing 5% interest,-

#### CROSS EXAMINATION

Mr. Barnes stated that he never heard Mr. Johnson state when he addressed the meeting at the Labor Temple, that the Pacific Co-Operative League would own the stores after they were purchased with money subscribed by San Diego residents. He also said that he did not hear Mr. Ames state that the Pacific Co-Operative League would own the store purchased with the money subscribed by San Diego people, when he addressed the meeting referred to in Mr. Barnes

(Testimony of John S. Seibert.)

testimony on direct examination. I understood that a wholesale grocery was to be organized, but that it was not already in existence.

The Board of Directors met about every week in 1920, with possibly an extra meeting in between. The membership met about once a month. Later on we changed it to every two weeks.

TESTIMONY OF JOHN S. SEIBERT for Respondent.

JOHN S. SEIBERT, a witness produced on behalf of Respondent, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

My name is John S. Seibert. I am an architect and civil engineer. I have resided in San Diego for eleven or twelve years.

I know Mr. Hadlon, Mr. A. A. Johnson and Mr. Ames. I was present at meetings in December, 1919, at the Labor Temple. I do not remember who was there - I think Mr. Barnes and Mrs. Gleason were there. Mr. Hadlon stated that the movement was on foot to open co-operative stores in San Diego, the membership fee in which, or rather the fee to be paid to entitle one to membership, was \$50.00, \$10.00 of which would be a life associate membership with the Pacific Co-Operative League, and the remaining \$40.00, a certain percentage, I believe 25%, was to be set aside for establishing a wholesale store, and the balance to be used under the guidance of the Pacific



(Testimony of John S. Seibert.)

Co-Operative League to open a store in San Diego. He pointed out that 5% interest was to be paid on the \$40.00, and that whatever savings were made in the course of a year or six months, as might be agreed upon, would be returned in the form of rebate to the individual members.

Mr. Hadlon did not state that the stores to be opened in San Diego would be owned or controlled by the people who subscribed the loan capital. He pointed out the fact that the Pacific Co-Operative League owned and operated stores along the Pacific Coast and had been in business since 1913, and had never had a failure.

Mr. Johnson spoke at several meetings. He stated he was now ready to receive subscriptions for loan capital, as loan capital stock to the Pacific Co-Operative League; that he had been sent to San Diego as Organizer and that money so contributed or loaned would be used to open a store in San Diego under the supervision of the Pacific Co-Operative League. He told us that the Manager was to be appointed and would be in the employ of the Pacific Co-Operative League, a skilled man in that particular business, who would have to make a daily report to the Home Office, and that if at any time his report showed that the business was not on a paying basis, it would be the policy of the Pacific Co-Operative League to close that particular store. We were to receive 5% on the loan capital, and \$10.00 would be associate life membership, and that withdrawal of the loan capital



(Testimony of John S. Seibert.)

could be had only from a reserve fund if there was one, of the local association, upon the approval of the Board of Directors of the central board. He said a certain amount would be set aside for the establishment of a wholesale store. Mr. Johnson did not state in my presence, that the stores would be owned or controlled by the subscribers to loan capital.

I was one of the Directors of the San Diego Branch of the Pacific Co-Operative League. I went on after the deal for the purchase of the stores was made. I had nothing to do with the deal for the purchase of the stores. The Board of Directors of the Local Association did not employ nor pay the Manager. They did not insure the property. They did not pay any taxes. They exercised only an advisory control over the Manager. By that, I mean we advised with him when he made reports as to the policy, such as advertising, painting of store front and of the store itself. We did not employ any of the help in the store, nor have anything to do with the business of selling goods in the store. We did not have a right to check against the account. The bank account was not in our name. The Manager of the store made monthly reports to the Local Board of Directors. While I was director, one dividend or rebate was paid on purchases. The Local Board took the report issued by the Manager and divided the amount that was left after all expenses had been paid, or the profits, and divided it into three equal parts, as I remember- -educational, reserve fund and rebate. Out of

(Testimony of John S. Seibert.)

this rebate fund we estimated or figured out how much each persons return would be in accordance with the amount of purchases he or she had made, and a certain percentage on purchases, 4% as I remember it. This was out of the profits of the first four months from the San Diego stores. The list was prepared and sent to the San Francisco office without recommendation that it be paid. We got the figures from the Local Manager.

### CROSS EXAMINATION

Mr. Johnson did not state that the Pacific Co-Operative League would own stores purchased with money subscribed by the San Diego people. I do not remember his using the word "own" at all in that connection. He said control. I attended a meeting addressed by Mr. Ames. I do not remember his stating that the stores would be owned by the Pacific Co-Operative League. Mr. Johnson stated that the benefits to be derived by joining the Pacific Co-Operative League were that it would bring the producer and consumer closer together and reduce the cost of living; that they would furnish expert Managers for the store; that they would audit the books of the store. He stated that the funds were supposed to be kept in the hands of the Pacific Co-Operative League; that the receipts of the store were supposed to be sent to the San Francisco office and the bills of the store to be paid up there through the Pacific Co-Operative League. I never heard him use the word "Trustee" He stated that they would operate the stores for the benefit of

(Testimony of H. C. Israel.)

the subscribers. The Manager made monthly reports to the Local Board of Directors. As one of the Directors of the local association I took part in determining the amount of dividend that was paid to the members.

#### TESTIMONY OF H. C. ISRAEL for Respondent.

H. C. ISRAEL, a witness produced on behalf of Respondent, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

I discussed with Mr. Johnson who would control the local store. He told me it would be controlled by the Pacific Co-Operative League. I am a subscriber to loan capital certificates, I was present at two or three meetings addressed by Mr. Johnson. Mr. Johnson did not say what was to be done with loan capital at any of the meetings. I was with Mr. Johnson on two or three evenings getting new members. I live at Coronado and am well acquainted over there.

#### CROSS EXAMINATION

I subscribed my loan capital prior to the representations of Mr. Johnson with reference to ownership, after my conversation with Mr. Johnson in regard to ownership, I interviewed prospective members. I stated very definitely to these prospects that the stores would be owned and operated by the Pacific Co-Operative League. I cannot recall all of the persons that I interviewed. I interviewed one man, a Mr. Sexton in San Diego, I do not know his initials.

(Testimony of Nora White Simpson.)

He lives on E Street between 7th and 8th in Coronado. I cannot recall any other prospects that I interviewed, by name right now. I do not think I know Mrs. H. A. Swan in Coronado. I am not acquainted with Thomas C. Young in Coronado. The name of R. A. Schultz is familiar, but I do not recall the initials. I do not know of a single person that I interviewed who later became a member of the association.

TESTIMONY OF NORA WHITE SIMPSON for Respondent.

NORA WHITE SIMPSON, a witness produced on behalf of Respondent, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

My name is Nora White Simpson. I am a subscriber of one of the loan capital certificates of the Pacific Co-Operative League. I know Mr. Hadlon and Mr. A. A. Johnson and Mr. Ames. I was elected on the Board of Directors of the San Diego Co-Operative Association in June 1920.

I attended a meeting one evening at the Labor Temple at which Mr. Johnson was present. I think he came in late. He spoke on this League proposition. I really do not remember just what he said. I attended a meeting at which Mr. Ames spoke, in the theatre in the east part of town but I got in late and the room was full and I had to take a rear seat and was not able to hear definitely all that was said.



(Testimony of Nora White Simpson.)

Almost immediately after I became a Director I went north with my family on an automobile trip and was gone a number of weeks, and I had really supposed that my election as an officer had lapsed because of that absence, but was afterward called I think by Mr. Johnson and reminded that I should be present at the meeting of the Board of Directors. The stores had been purchased during my absence. Mr. Floaten was the first Manager, after that Mr. Kinard and after that Mr. Huggins. The Board of Directors did not, to my knowledge, assume any control over the Manager of the store. There was a discussion about this matter in the Board of Directors, I am unable to state the date or what particular meeting, - I think it was early in my career as a Director. I cannot state definitely who was present. I do not remember who made the suggestion that the Board should have control over the Manager. I only remember that it was discussed, and the final conclusion was that the Board of Directors had no control over the Manager at all. The Board of Directors did not, to my knowledge, take any part in buying of merchandise or hire of help or of Manager, or paying of Manager or in the payment of taxes, or of insurance. The Manager made reports to the Local Board of Directors of the financial condition of the business. I was present at all the meetings of the Board of Directors except one.



(Testimony of H. A. Floaten.)

TESTIMONY OF H. A. FLOATEN for Respondent.

H. A. FLOATEN, a witness produced on behalf of Respondent, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

My name is H. A. Floaten. I was employed by the Pacific Co-Operative League from the fall of 1919 up to July, 1921. My residence is #138 North Ardmore Avenuc, Los Angeles. While employed by the Pacific Co-Operative League I was store supervisor. My duties were to start the stores when a sufficient amount of money had been raised. I was sent in to close the deal, or start the store from the beginning and see that it was running under the plan of the League—to start from the beginning, laying a foundation.

I made a visit to San Diego about the middle of July, 1920, under instructions from Mr. Ames, General Manager of the Pacific Co-Operative League. My salary was paid from the San Francisco office.

When I came to San Diego Mr. A. A. Johnson, Mr. Barnes, Mr. Bischoff and myself called on Mr. Hammond, who was running the Consumers Grocery, a corporation, and talked to him about buying his business. He showed me the stores, how situated, the amount of business he was doing, like anyone would in regular business affairs, just like a buyer and seller would do to each other. I reported to the

(Testimony of H. A. Floaten.)

Pacific Co-Operative League in San Francisco and then I went away.

I came back in August, 1920, on instructions from the Pacific Co-Operative League in San Francisco. I was told that Mr. Hammond had signified his intention to sell out and had made some agreement here with parties on the ground, and to go ahead and consummate the deal. We took an inventory and paid him a draft. The inventory was between \$21,000.00 and \$22,000.00. I had a conversation with Mr. Hammond in regard to the recordation of notice of sale. Notice of Sale was prepared by Mr. Hammond's attorney and recorded. The Notice of Sale read from him to the Pacific Co-Operative League. I drew a draft for \$12,000.00 on the Pacific Co-Operative League in San Francisco in favor of the Consumers Grocery Company. That draft was paid by the Pacific Co-Operative League. The draft was offered in evidence as Respondent's Exhibit "9", and a copy of same is inserted herein:

"PACIFIC CO-OPERATIVE LEAGUE, INC.

X00562 No. 8551

236 Commercial St., San Francisco,

Sept. 1, 1920.

PAY TO THE ORDER OF Consumers Grocery  
Company,

Twelve Thousand Dollars (\$12,000.00)

Being Part Payment And Charge to Account of  
on Stock of Mer- San Diego Co-Operative Stores

(Testimony of H. A. Floaten.)

chandise and Fix-

Signed H. A. Floaten

tures at 426 Market St.,

618 5th St., and

1033 Broadway.

”

The balance of the purchase price was paid by taking the daily receipts. The total purchase price was \$21,616.38. \$5,476.36 was paid out of the proceeds of the store; that left a balance of \$3,140.02. That was paid by draft drawn on the Pacific Co-Operative League in San Francisco, which draft was paid. The draft was introduced in evidence as Respondent's Exhibit “10”, and is herein inserted:

“PACIFIC CO-OPERATIVE LEAGUE, INC.

No. 8557.

236 Commercial St., San Francisco.

Sept. 11, 1920.

PAY TO THE ORDER OF Consumers Groc.  
Company Thirty One Hundred Forty & 02/100  
Dollars (\$3140.02)

Being AND CHARGE TO ACCOUNT OF  
payment for San Diego Branch,

Settlement in full Signed H. A. Floaten, Mgr.”

Subject to any

Minor adjustment.

A Bill of Sale was received from the Consumers Grocery Company in favor of the Pacific Co-Operative League. Said Bill of Sale is Respondent's Exhibit “3”, and is herein reproduced:

(Testimony of H. A. Floaten.)

“KNOW ALL MEN BY THESE PRESENTS:

That CONSUMERS GROCERY CO. (Inc.)  
426 Market St., the parties of the first part, for  
and in consideration of the sum of TEN DOL-  
LARS.....of the United States of America,  
to us in hand paid by THE PACIFIC CO-  
OPERATIVE LEAGUE (Inc.), the parties of  
the second part, the receipt whereof is hereby  
acknowledged, does by these presents grant, bar-  
gain, sell and convey, unto the said parties of the  
second part, its executors, administrators and  
assigns, One Ford Delivery car, and the furni-  
ture and fixtures and grocery stock located in  
stores at

426 Market St.

620 Fifth St.

1033 Broadway.

(This Bill of Sale void in case of failure of The  
Pacific Co-Operative League to pay draft drawn  
on San Francisco this date).

TO HAVE AND TO HOLD the same to the  
said parties of the second part, its executors,  
administrators and assigns forever. And they  
do for their heirs, executors, and administrators,  
covenant and agree to and with the said parties  
of the second part, its executors, administrators  
and assigns, to warrant and defend the sale of  
said property, goods and chattels, hereby made  
unto the said parties of the second part, its  
executors, administrators and assigns, against all



(Testimony of H. A. Floaten.)

and every person or persons whomsoever, lawfully claiming or to claim the same.

WITNESS our hands and seal this 11th day of Sept. 1920.

CONSUMERS GROCERY CO.,  
426 Market Street,  
Justin Hammond, Pres.

(Reverse Side)

### BILL OF SALE.

Consumers Groc. Co. to Pacific Co-Operative League.

Dated Sept. 11th, 1920."

Each of us had an equal number to assist in taking inventory at the time the sale was made. Some of the persons representing us were Mr. Eason, Mr. Barnes and Mr. Bischoff. I can't name all of them but we had ten or eleven and Mr. Hammond furnished an equal number from his employees to represent him.

\$2,000.00 was borrowed from a man by the name of Johnson to help pay the price of the store. The money was deposited in the bank in the name of the Pacific Co-Operative League, by Mr. Kinard, the store Manager. I made arrangements for the note with Mr. A. A. Johnson. After the purchase of the stores, I remained in charge for two months at least. I reported to the Pacific Co-Operative League in San Francisco daily. I deposited the money to the account of the Pacific Co-Operative League. It was subject only to the checks of the officers of the Pacific Co-Operative League in San Francisco. It was not subject to the check of anybody in San Diego.



(Testimony of H. A. Floaten.)

When I left in October, 1920, Mr. Kinard remained in charge of the store. I employed Mr. Kinard to start them. He was paid his salary by the Pacific Co-Operative League. Mr. Ames came down from San Francisco and confirmed my appointment of Mr. Kinard as Manager. The local Board had nothing to do with the employment of Mr. Kinard. They were not consulted. I had no conversations with the local Board with regard to the deposit of money or in whose name it was to be deposited. Some of them knew where it was deposited and in whose name.

From October, 1919, to July, 1921, I opened stores for the Pacific Co-Operative League at Tucson, Orcutt, Maricopa, Taft, McKittrick, Bizbee and Douglas, Arizona, San Diego, and Las Vegas, Nevada. The procedure in San Diego was the same as in all the other cases. All the money was deposited in the name of the Pacific Co-Operative League.

Q. You may state, Mr. Floaten, whether or not you became a creditor on the faith that the Pacific Co-Operative League was the owners of all these stores, including the three stores in San Diego?

MR. HERTEL: Objected to as calling for conclusion of witness.

MASTER: Objection sustained.

MR. BAILIE: I will ask that the witness answer the question.

MASTER: He can answer it, but it is disregarded as far as I am concerned. The record can show it.

A. Well, yes.

(Testimony of H. A. Floaten.)

(No ruling on this was made by District Court).

Part of my claims against the Pacific Co-Operative League was incurred after the purchase of the San Diego stores.

### CROSS EXAMINATION

My claim is in the neighborhood of \$4,000.00 for money loaned to the Pacific Co-Operative League. The money was loaned to use in its merchandising business. The first loan was made while I was in Tucson establishing a store in 1919. At that time I advanced \$2,000.00. The next money I loaned was between March and June, 1921. The money was loaned to the Pacific Co-Operative League. I have a note of the Pacific Co-Operative League as security. I made the money myself that I loaned to the League. I received a salary of \$150.00 per month from the League. I was not paid regularly. I do not have an independent income.

Q. Where did you get this money to loan to the League?

A. I made it myself.

Q. Off the stores you opened?

A. I made it out of the stores I opened.

Q. Did you?

A. Did I? How could I make it out of the stores I opened?

I know that the money collected from the loan capital subscription was not sufficient to buy the business.

(Testimony of H. A. Floaten.)

By-Laws Pacific Co-Operative League, Section 4,  
Article 9,

“Each local branch upon being admitted into the Pacific Co-Operative League shall transfer to the League the funds collected as loan capital for the establishment of its store, for which there shall be immediately issued membership Loan Capital Certificates. The central Board of Directors of the Pacific Co-Operative League which then proceeds to institute the store and shall provide equipment and stock for the same with the funds as above provided, etc.”

The Pacific Co-Operative League opened stores when the demand came for stores. Sometimes there was sufficient money and sometimes not. That did not stop us from opening the stores. I was present at the time the Notice of Sale was discussed. There was just Mr. Hammond and myself. Mr. Hammond and I were present when the Bill of Sale was given. The San Francisco office kept a record of all money that was paid in by local subscribers and the drafts drawn in payment of the stores were charged against that money. Every store had its own account in the Accounting Department. At the time the Notice of Sale and the Bill of Sale was executed, no one was present but Mr. Hammond and myself.

I am familiar with a Branch of the Pacific Co-Operative League that was organized at Atascadero, California. I helped organize it. The Pacific Co-Operative League operated the Atascadero stores They

(Testimony of H. H. Dobbs.)

do not still operate. It is still in operation. They are not operated by the bankrupt estate or estate in bankruptcy, so far as I know.

The small sign on the Broadway store reading "This store is owned by 500 families, etc." was ordered and contemplated before I left San Diego when the store was started. I think it was put on by Mr. Johnson. He had the sign made and put on. There was a Labor Parade going and he wanted to advertise. The sign was ordered with my knowledge.

#### TESTIMONY OF H. H. DOBBS for Respondent.

H. H. Dobbs, a witness produced on behalf of Respondent, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

My name is H. H. Dobbs. I reside in San Francisco. I have resided in San Francisco for two years.

On May 15th, 1920, I became assistant to the President and General Manager of the Pacific Co-Operative League. My duties consisted of management of the office, organizing departments and the field force, and all matters in the absence of the General Manager. I was his representative. I was in charge of the accounting and bookkeeping department.

I visited San Diego in May, 1920, in company with Mr. Ames, Mr. Sessions and Mr. Brunaker. Mr. Ames was President of the League, Mr. Sessions was Assistant Auditor of the League and Mr. Brubaker was Field Supervisor of the League.



(Testimony of H. H. Dobbs.)

I am familiar with the fact that certain moneys came into the possession of the Pacific Co-Operative League as the result of the payment of loan capital subscriptions from the people in San Diego. Mr. A. A. Johnson was doing the organizing work, soliciting memberships and receiving payments on same. He made a semi-monthly transmission report, showing on such report the name of the party subscribing, the amount subscribed, dividing the membership fee from the loan capital subscription and showing the actual payment with its initial receipt, together with evidence of the money collected or received by him having been deposited in the bank or sent to the San Francisco office. This mail was delivered either to my desk or Mr. Ames' desk. A copy of the transmission report was retained by me and the other sent with evidence of the remittance to the cashier and auditor, who approved the sheet, initialed it and turned it over to the register. The register checked the receipts of secondary payments against the transmission reports and then entered on what is termed by us a membership envelope the man's name, address and associate number as member of the Pacific Co-Operative League, entering in addition the number of the receipt issued, date of issue and the amount paid. From that he posted the amount into the loan capital ledger, and that was the process of our records.

On the control account of the Pacific Co-Operative League, the Pacific Co-Operative League is charged with the amount and the loan capital stock ledger is



(Testimony of H. H. Dobbs.)

credited with that as capital. Each group had its accounts segregated and its stock ledger for convenience and identification in posting. The money was all deposited and merged in one bank account. The loan capital money was divided, 75% being loan capital and 25% for wholesale purposes. We received money from the sale of merchandise through the various stores, through the direct order department, and some from purchasers who purchased from the Pacific Co-Operative League merchandise they obtained from us. The money from all these different sources went into the one bank account. We borrowed money at various times, and that money was put in the same bank account with all the other money. All the book accounts were kept in San Francisco, 236 Commercial Street. The corporation books were kept there and all books of all the stores were kept in the same place.

On September 1st, 1920, the total subscriptions to loan capital in San Diego were \$22,070.00. Of this amount \$13,975.00 was paid in cash, \$3,493.75 was set aside for the wholesale account, and \$10,481.25 was set aside in the capital account. There was a loan of \$2,000.00. Including the loan and the capital, there was \$11,981.25 available for the purchase of stores at the time they were purchased. The purchase price of the stores was \$21,616.38. This purchase price came from San Diego subscriptions, from the specific loan, from loans made by the Pacific Co-Operative League for the time being and from sales for the first few days of the month of September. After

(Testimony of H. H. Dobbs.)

all available cash had been exhausted, the balance of the purchase price of the stores came from the general fund of the League. The money to make up the deficit came from all the sources from which the Pacific Co-Operative League could get money. Reports were made to the San Francisco office by the Managers of the stores. Daily reports were sent in. The Managers of the stores at San Diego were employed by the Pacific Co-Operative League. They were bonded to the Pacific Co-Operative League; their authority came from the central office at San Francisco. They were instructed not to take orders from the local Board of Directors. When the stores were taken over, the insurance was changed on them to the Pacific Co-Operative League. The policies of insurance bearing the following endorsement:

"Assignment of policy (actual sale and transfer of property). The ownership of the property insured in the attached policy No. 120289 of the Old Colony Insurance Company having actually passed to Pacific Co-Operative League for value received, we hereby transfer and assign unto it all our title and interest in this policy. This assignment is subject to all the terms and conditions therein mentioned and referred to. WITNESS OUR HANDS AND SEALS this 11th day of September, 1920.

Witness: Gilman A. Gist.

Consumers Grocery Co., Inc.,  
F. S. Kinard, Sec. & Treas.

(Testimony of H. H. Dobbs.)

Consent to Assignment

The ownership of the property insured in the attached Policy No. 120289 of the Old Colony Insurance Company having actually passed to Pacific Co-Operative League, the said Insurance Company hereby consents that the interest of Consumers Grocery Co., Inc., in the said Policy be assigned to Pacific Co-Operative League. This consent being subject to all the terms and conditions therein mentioned and referred to, and being granted upon the especial condition that the said assignee shall be responsible and liable to said Company for all premiums now due, or which may hereinafter become due on said policy. This consent is granted upon the further condition that the same shall only be valid and binding while actually attached to said policy.

Attached to Policy No. 120189 of the Old Colony Insurance Company, issued to Consumers Grocery Co., Inc., Agency at San Diego, Cal.

Dated, September 11, 1920.

Gilman A. Gist, Agent."

(Respondent's Exhibit "16")

The Pacific Co-Operative League carried compensation insurance on the employes in San Diego in its name. The manager was bonded to the Pacific Co-Operative League. The interest on the loan capital subscription was charged to the general interest account.

(Testimony of H. H. Dobbs.)

The term rebate or dividend as used by the Pacific Co-Operative League, is an amount of profit made from the sale of merchandise in the store for a given period of time. The determining of that dividend is by obtaining the actual profits made in the business for that given period of time as well as the sales to each individual member. They are totalled, ratioed and paid on that basis.

The Pacific Co-Operative League has paid the taxes on the San Diego stores since they were purchased. The money to pay interest on the loan capital certificates was paid out of the general profits of the business and not out of profits of the local group.

### CROSS EXAMINATION

The 25% referred to as set aside for wholesale purposes did not refer to an established wholesale corporation. It was to be used by the League for wholesale operations. The Pacific Co-Operative League never borrowed any money specifically for the San Diego stores. I did not have anything to do with the loan made by Mr. Templeton Johnson. I was acting in my official capacity at that time. The 25% of the loan capital set aside on the books for wholesale purposes could be used for the purchase of stores. It could be used for the purchase of the San Diego store.

Petitioners Exhibit #21, a letter written to the San Diego Association and signed by Mr. Dobbs:

“Our records show here that you have approximately 400 members from which \$6,500.00



(Testimony of E. O. F. Ames.)

in loan capital has been paid in. This is of course approximate, too. \$750.00 of this has been used as wholesale capital, but this is available for the purpose of purchasing or the establishing of a store for San Diego."

The expenses of a local group of stores were never, as a matter of bookkeeping, charged on the books to any other group. We had a stock ledger. We called it stock, it was really loan capital. I did not notify the people that a 25% and 75% division was made. It was only a matter of expedition in accounting. It was not a custom to declare any rebate or dividend to these people on profits in other places. They were declared on the earnings of each unit.

TESTIMONY OF E. O. F. AMES, for Respondent.

E. O. F. AMES, a witness produced on behalf of Respondent, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

I reside in San Francisco. I am President of the Pacific Co-Operative League and have been from December, 1919 to the present time. The Pacific Co-Operative League is now in bankruptcy.

I was present at a meeting in the theatre in the City of San Diego in the spring of 1920. I did not state at that time that any stores which would be opened in San Diego would be owned or controlled by the loan capital subscribers of San Diego.



(Testimony of J. R. Dennison.)

I made a second visit to San Diego in October 1920. At that time I met the Board of Directors of the San Diego Branch of the Pacific Co-Operative League, which was the local Association. We met in the office of the store. There were present besides myself Mr. Bischoff, Mrs. Simpson, Mr. Eason and there were others there, but I cannot remember their names. I believe only one of the full Board was absent. There were seven on the Board. At that time I told the Board of Directors of the Local Association that they had no part and should take no part in the operation of the business, and that they should not in any way get between the Home Office and the Manager. The date of the last meeting was October 27th, 28th or 29th, 1920. At one of these meetings I made it clear that the stores were to belong to the Pacific Co-Operative League. I told them the stores, when established, would be a branch of the Pacific Co-Operative League, owned and operated by the Pacific Co-Operative League. I told this to the local people both in public address and in private.

#### REBUTTAL TESTIMONY OF J. R. DENNISON.

J. R. DENNISON, a witness produced on behalf of Petitioners, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

My name is J. R. Dennison. I was present at meetings in San Diego addressed by Mr. Ames. One of them was in a theatre. At this meeting Mr.

(Testimony of Charles J. Eason.)

Ames did not state that after the organization of the local Association and the purchase of the stores they would be owned and operated by the Pacific Co-Operative League.

REBUTTAL TESTIMONY OF CHARLES J. EASON, on behalf of Petitioners:

I was present at a meeting of the Board of Directors of the San Diego Co-Operative Association on the 27th, 28th or 29th of October, 1920, at which Mr. Ames was present.

There was no formal meeting of the Board of Directors. Mr. Ames on that date met with some of the Directors. Mr. Ames at that meeting did not state in my hearing that the Board of Directors could not interfere in the control and management of the business—could not stand between the Pacific Co-Operative League and the local Manager or interfere in any way. At the time of this meeting referred to, when Mr. Ames met the Board of Directors, I was not in agreement with the other members of the Board of Directors, particularly in regard to the control and operation of the store and the handling of the finances of the Association. The difficulty between me and the Pacific Co-Operative League was that I believed the Local Association should have some account of the finances of the members of the Association. The contention of Mr. Ames was that the money collected should be turned in to the local store and transmitted to the Pacific Co-Operative

(Testimony of A. A. Johnson.)

League through the local stores. He was quite insistent on that, and as a result of the meeting, I resigned. I signed a note for the loan made by Templeton Johnson as Secretary of the San Diego Branch of the Pacific Co-Operative League.

Upon cross-examination Mr. Eason stated: I do not know of any endorsement or guarantee to the note made by the Pacific Co-Operative League.

REBUTTAL TESTIMONY OF A. A. JOHNSON,  
on behalf of Respondent:

With regard to a certain note for \$2,000.00 for money loaned by Mr. Templeton Johnson, I went to Mr. Johnson and told him we were short. The business office needed money in buying the store and we would have to have more money to close the deal with the Consumers Grocery Company, and we would have to have it right away, and Mr. Johnson agreed to let us have \$2,000.00 for, I believe, three months, so I drew up a note which was signed by Mr. Eason and took it to Mr. Johnson from the Local Association and he said he could not recognize it that way; that he would not accept it that way. If the League would sign the note he would accept it. I told him that we had to have the money right away and could not wait for the endorsement, as Mr. Hammond needed the money at once to close the deal. So he let me have check for the money with the understanding that I would return the note immediately to him when endorsed from San Francisco, and it was endorsed, came

back to me and I took it to Mr. Johnson. It was endorsed by the Pacific Co-Operative League.

### STIPULATION OF FACTS.

The Pacific Co-Operative League Stores was adjudicated a bankrupt on the 22nd day of February, 1922, and the Pacific Co-Operative League was adjudicated a bankrupt on or about March 15th, 1922. Both of these are corporations organized under the laws of the State of California.

In 1921 Mr. Huggins, who was Manager of the Three San Diego Stores, turned in a tax statement in the name of the Pacific Co-Operative League, which shows—

Store No. 1, 426 Market St., San Diego.

Auto .....	\$100.00
Fixtures .....	250.00
Merchandise .....	1365.00

Total .....\$1715.00

Taxes paid, \$65.68

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Store No. 2, 618 Fifth St., San Diego.

Fixtures .....	\$ 300.00
Merchandise .....	1445.00

Total .....\$1745.00

Taxes paid, \$66.83.

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Store No. 3, 11th & Broadway, San Diego.

Fixtures .....	\$ 350.00
Merchandise .....	1365.00

Total .....\$1715.00

Taxes paid, \$65.18



It was stipulated that at all times the officers of the Pacific Co-Operative League had a right to check against the bank account in San Diego of the Pacific Co-Operative League, and that the Pacific Co-Operative League gave authority to Mr. Huggins to also sign checks on that account.

It was stipulated that Mr. Dobbs prepare a statement from the books of the Pacific Co-Operative League at San Francisco showing the exact amounts of loan capital paid, showing the amount of loan capital subscribed and the amount of loan capital actually paid at the date of purchase of the stores. The following figures were taken from this record: \$15,393.00 cash paid on subscriptions at date of purchase; \$2,000.00 borrowed by the Local Association on a note from Templeton Johnson; \$17,393.00 total cash to credit of Local Association; inventory showing a total value of \$21,616.38; \$5,476.36 taken from cash receipts from operation of stores; actual purchase price paid in drafts on Pacific Co-Operative League \$16,140.02, leaving a balance of \$1,252.98 surplus to the credit of the Local Association after the stores were purchased.

The foregoing statement of evidence may be approved.

Elmer J Hertel

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Marcus W. Robbins      E J H

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Attorneys for San Diego Co-Operative Association,  
Appellee.

Norman A. Bailie and  
W. T. Craig

Attorneys for G. W. Brainard, Trustee, etc., Appellant.



Approved: Bledsoe, United States District Judge.  
July 25, 1923.

(Endorsed): Filed Jul 25 1923 Chas N. Williams,  
Clerk By L. J. Cordes Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

Glenn H. Munkelt, Esq., of San Diego, Cal., Special Master.

Wm. H. Moore, Jr., Ancillary Receiver, and Messrs. W. T. Craig and Norman Bailie of Los Angeles, Cal., Attorneys for Ancillary Receiver.

Messrs. Marcus W. Robbins and Elmer J. Hertel of San Diego, Cal., Attorneys for San Diego Co-operative Ass'n.

Byron F. Stone, Jr., of San Francisco, Cal., Attorney for Pacific Cooperative League Stores and Pacific Cooperative League, Bankrupt.

MEMORANDUM OPINION

Bledsoe, District Judge:— With respect to the report of the Special Master in the above entitled matter having to do with the application of the San Diego Cooperative Association for the delivery to it by the Receiver herein of three certain grocery stores situated in San Diego and the exceptions of the Receiver to such report, I have given the matter and the points presented in the comprehensive briefs of counsel, careful consideration. I can see no reason why the report of the Special Master should not be approved and confirmed.

It is true, of course, as claimed by the Receiver that the bankrupt was vested with and was actually engaged in the management of the three stores in question. It is equally true, however, and more to the point, that the members of the San Diego Cooperative Association themselves put up the money which was actually used to purchase these three stores and I have no doubt but that they at all times in good faith felt that they were the owners and operators of the stores. Their Board of Directors sat in judgment on many of the problems presented and when not so concerned they were taking advantage of the supposedly expert advice and experience in cooperative work furnished them by the Pacific Cooperative League. Because of their respective subscriptions and payments of real money to the Pacific Cooperative League, they acquired no interest or participation in any of the real or supposed general assets of the League. All their interest, dividends and profits and all their participation in any subsequent "dissolution" was limited to the activities and property of the specific stores purchased with their money. The San Diego members of the League were interested in no stores other than their own; other members were not interested in their stores.

It is apparent from the constitution and by-laws of the League itself, that with respect to "associate members" such as the San Diego members were, they were to contribute distinct funds to be handled by the League but that such funds were for the purpose of organizing distinct League branches "that they may

operate stores or enterprises." Such language would not have been used had it been intended that the stores or branches were to be the property of the League itself. So, also, the constitution provided that in order that the operation of such branch stores might be had, the Board of Directors of the League should order a survey of any proposed district to be made and decide the number of members and the capital required to operate such branch. The capital for such

purpose was to be provided by a payment of each applicant for his associate membership in the League itself, which sum was not to be returned to him, to the amount of ten dollars and such additional amount as with the other payments from similar memberships in that locality would provide the capital necessary to establish the branch in business.

It is provided and it was the actual experience of the San Diego Association that the interest at five percent upon the so called loan certificates, was paid out of the profits of the local stores at San Diego and the profits in addition, upon purchases made therein by the holders of the loan certificates, were also paid out of profits of such stores.

When all else is said, it remains the fact that these stores were bought with money actually furnished by the members of the San Diego Cooperative Association and it would require some definite and positive agreement, to which they were knowingly party, to hold that under such circumstances someone else was to become the owner and possessor of the properties

purchased by them and with their money. The contract for the purchase of the three stores was made by them. It was never approved and accepted by the League, or at least a part of it never was approved, and in any event, it is apparent that the members of the Association themselves picked out the stores wanted, negotiated respecting the prices thereof, and they were responsible for the purchase thereof. The League merely held their money and offered them advice from time to time and provided them a Manager who was paid out of profits arising from the operation of their own stores, all in accordance with its declared purpose. That the actual bill of sale was made out to the League as vendee and that other papers, indicative of ownership in it were executed, without the actual knowledge of the members of the San Diego Association, does not change the legal situation. Equity looks to the substance not merely to the form.

I cannot accede to the view seemingly expressed by Judge Bean of the District of Oregon, that as the League managed the store therefore the League must have been and was the owner of the store. If that were true, it would be a dangrous expedient for any purchaser or owner or possessor of property to employ someone to manage same for him.

If it be a fact that some members of the San Diego Cooperative Association have parted with their so called loan certificates and in return therefor have received stock or other certificates, that fact can have no influence here. The Association is entitled to



these three stores. As to who may be members of the Association and entitled to participate in the profits from or funds arising out of a dissolution of the stores, is another matter. If members of the Association shall have surrendered their loan certificates and in that wise, in equity or otherwise, surrendered or divested themselves of their interest or membership in the Association, then they have no right to participate in any profits accruing to the Association or to a division of any property belonging to the Association; and by the same token, if the Pacific Cooperative League Stores is now possessed of such loan certificates, the Receiver thereof will be entitled to make such use of them and enjoy such rights accruing from them as the individual owners thereof would had they remained in possession of them. Surrender of certificates by some would not change the legal rights inuring to the others.

Thirty exceptions were filed by the Receiver to the report of the Special Master. All of these exceptions are overruled and pursuant to Federal Equity Rule 67, there is hereby taxed as against the Receiver, the sum of five dollars for each of such exceptions so taken and overruled.

The report of the Special Master is confirmed and an appropriate order, directing the delivery of the property, as prayed for, will be entered. Counsel for the Association will prepare such order.

November 23, 1922.

(Endorsed): Filed Nov. 23, 1922 Chas N. Williams, Clerk By Edmund L. Smith, Deputy Clerk



[TITLE OF COURT AND CAUSE.]

ORDER.

On the 23rd day of November, 1922, came on to be heard the Exceptions of Wm. H. Moore, Jr., the Ancillary Receiver in the above entitled matter, to the Report of the Special Master and the Report and Recommendations of the Special Master filed herein, and the same were argued by counsel and submitted; and, upon consideration thereof, IT IS ORDERED, ADJUDGED AND DECREED as follows:—

That the Exceptions of the Receiver herein to the report of the Special Master and to the report and recommendations of the Special Master be, and they are each of them hereby overruled, and the report of the Special Master and the report and recommendations of the Special Master are hereby confirmed;

That the prayer of the petition of the Receiver herein for an order to show cause against the San Diego Co-Operative Association is hereby denied, the rule of said order to show cause discharged, and said petition dismissed;

That Wm. H. Moore, Jr., the Ancillary Receiver in Bankruptcy herein and the respondent to the petition in reclamation of said San Diego Co-Operative Association, has no interest in or right to the possession of the stock in trade, fixtures, furniture, equipment, books of account, and other personal property, located upon the premises situated in the City of San Diego, County of San Diego, and State of California, and generally known as 618 Fifth Street, 426 Market

Street, and 1033 Broadway, together also with the good-will of the general merchandise business being carried on at said places;

That Wm. H. Moore, Jr., the Ancillary Receiver herein, be and he is hereby ORDERED to deliver possession of all of the said property above described to the said San Diego Co-Operative Association, and upon such delivery to render to said Association an account, showing the money taken in and paid out by himself in the conduct of said business during the term of his receivership; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said San Diego Co-Operative Association does have and recover of and from said Wm. H. Moore, Jr., as Ancillary Receiver herein, the sum of Five (\$5.00) Dollars as costs for each of the Thirty (30) Exceptions taken by said Receiver to the report of the Special Master and over-ruled by the Court, amounting in all to the sum of One Hundred Fifty (\$150.00) Dollars; and

IT IS FURTHER ORDERED that the order heretofore made and entered herein on the 8th day of December, 1922, be and the same is hereby vacated, and that this Order take effect as of said 8th day of December, 1922.

Bledsoe

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JUDGE OF U. S. DISTRICT COURT.

APPROVED AS TO FORM, as provided in Rule  
45.

W. T. Craig

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Norman A. Bailie

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Decree entered and recorded Dec. 18 1922

Chas. N. Williams, Clerk

By Edmund L. Smith, Deputy Clerk.

(Endorsed): Filed Dec. 18 1922 Chas. N. Wil-  
liams, Clerk By Edmund L. Smith Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

### ASSIGNMENT OF ERRORS.

Comes now G. W. Brainard, Trustee in Bankruptcy  
of the estate of the Pacific Co-Operative League  
Stores, Inc., bankrupt, and files the following assign-  
ment of errors:—

#### I

That the United States District Court for the South-  
ern District of California, Southern Division, ERRED  
in overruling the exceptions of Wm. H. Moore, Jr.,  
Ancillary Receiver herein, to the report and recom-  
mendations of Glenn H. Munkelt, Special Master.

#### II

That said Court ERRED in confirming the report  
and supplemental report of said Special Master.

#### III

That said Court ERRED in denying the prayer of  
the petition of said Wm. H. Moore, Jr. as Ancillary  
Receiver herein for an order to show cause against

said San Diego Co-Operative Association and in discharging the rule of the order to show cause issued on said petition, and dismissing said petition.

#### IV

That said Court ERRED in ordering that said Wm. H. Moore, Jr. as Ancillary Receiver herein had no interest in or right to the possession of the stock in trade, furniture, fixtures, equipment, books of account, and other personal property belonging to the three (3) grocery stores situated in the City of San Diego, State of California, and generally known as numbers 618 Fifth Street, 426 Market Street, and 1033 Broadway.

#### V

That said Court ERRED in finding and ordering that the title to said three (3) stores was vested in said San Diego Co-Operative Association and not in said Pacific Co-Operative League Stores, Inc., and its successor, G. W. Brainard, Trustee in Bankruptcy of said Pacific Co-Operative League Stores, Inc.

#### VI

That said Court ERRED in ordering said Wm. H. Moore, Jr., as Ancillary Receiver herein, to deliver possession of said three (3) stores to the said San Diego Co-Operative Association, and in ordering said Receiver to account to said Association for the money taken in and paid out by him in the conduct of the business of said stores during his Receivership.

#### VII.

That said Court ERRED in not sustaining the exceptions filed for and on behalf of said Ancillary Re-

ceiver to the report and supplemental report of said Special Master.

VIII

That said Court ERRED in not ordering and decreeing that the title to said three (3) grocery stores is vested in the Trustee in Bankruptcy of the estate of said Pacific Co-Operative League Stores Inc., bankrupt, and in not holding that said San Diego Co-Operative Association has no right, title or interest in or to said stores, or any part thereof.

Norman A. Bailie, Joseph

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Kirk and W. T. Craig

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Attorneys for said Trustee.

(Endorsed): Filed May 21 1923 Chas. N. Williams, Clerk By Edmund L. Smith Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

PETITION FOR ALLOWANCE OF APPEAL  
AND ORDER ALLOWING THE SAME.

To the HONORABLE JUDGES OF THE UNITED  
STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA,  
SOUTHERN DIVISION:—

G. W. Brainard, as Trustee in Bankruptcy of the estate of the Pacific Co-Operative League Stores, Inc., bankrupt, and substituted herein by order of Court in the place and stead of Wm. H. Moore, Jr., Ancillary Receiver herein so far as the controversy hereinafter mentioned is concerned, feeling aggrieved by



the minute order of Court made and entered in the above entitled matter on the 23rd day of November, 1922, confirming the report of Glenn H. Munkelt, Special Master, and ordering the return of the three (3) stores mentioned in said minute order by the said Ancillary Receiver to the San Diego Co-Operative Association, and overruling the exceptions to the report of said Special Master, and directing an order to be prepared and filed in conformity thereto; and also feeling aggrieved by the order of said Court of December 8th, 1922, made in pursuance of said minute order,

Does hereby petition for an appeal from said minute order of November 23rd, 1922, and said final order of December 8th, 1922, to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that this appeal may be allowed, and that a citation be issued, as provided by law, directed to said San Diego Co-Operative Association, commanding said San Diego Co-Operative Association to appear before the United States Circuit Court of Appeals for the Ninth Circuit, to do and receive what appertain to Justice to be done in the premises, and that a transcript of the records and evidence pertaining to said controversy, duly authenticated, may be transmitted to said United States Circuit Court of Appeals.

G. W. Brainerd

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Trustee in Bankruptcy for the  
Estate of Pacific Co-Operative  
League Stores, Inc., Bankrupt.

Norman A. Bailie, Joseph

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Kirk and W. T. Craig

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Attorneys for said Trustee.

The foregoing Appeal is hereby ALLOWED, no bond being required of petitioner under Section 25-C of the Bankruptcy Act.

DATED: May 21, 1923.

Wm P. James

United States District Judge.

(Endorsed): Filed May 21 1923 Chas. N. Williams Clerk By Edmund L. Smith Deputy Clerk

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[TITLE OF COURT AND CAUSE.

STIPULATION REGARDING RECORD ON  
APPEAL.

IT IS HEREBY STIPULATED AND AGREED  
by and between the undersigned as follows:

FIRST. That the captions of all pleadings and papers filed in the controversy now on appeal in above matter, except the petition in reclamation of the San Diego Co-Operative Association the caption of which shall be printed in full, shall be omitted from the printed record on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit; and that all other than these excepted pleadings and papers shall be headed only with a statement of their respective nature, purpose, date or subject sufficient to identify them, and that all pleadings and papers filed herein subsequent to the said petition in reclamation

shall be deemed to be headed with the same title of Court and cause as in said petition in reclamation; that all attorneys' cards on all pleadings and papers, and all endorsements on the backs or covers of all pleadings and papers shall be omitted from said printed record.

SECOND. That the statement of evidence under Equity Rule No. 75 filed herein shall be printed in said record on appeal so as to include and incorporate all the omissions, corrections and insertions indicated thereon, but without showing the condition of the typewritten portion thereof before such omissions, corrections and insertions were made, and without showing what omissions, corrections and insertions were made therein; that mechanical imperfections and self-evident typographical errors in all the pleadings, papers and documents may be disregarded and shall not be preserved or duplicated in said printed record on appeal.

THIRD. That the record on appeal to be certified by the Clerk of the United States District Court, Southern District of California, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit, in the controversy on appeal in the above entitled matter shall consist only of those plead-

ings, papers and documents mentioned in the praecipe for record on appeal, together with this stipulation.

DATED: August 1st, 1923.

Norman A. Bailie and

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W. T. Craig

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Attorneys for G. W. Brainard as Trustee in Bankruptcy of the Pacific Co-Operative League Stores Inc., Bankrupt, Appellant, Marcus W. Robbins E.H.

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Elmer J. Hertel

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Attorneys for San Diego Co-Operative Association, Appellee.

(Endorsed): Filed Aug. 6, 1923. Chas. N. Williams, Clerk, By L. J. Cordes Deputy Clerk.

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[TITLE OF COURT AND CAUSE.

PRAECIPE.

TO THE CLERK OF SAID COURT:

SIR:

Please make a transcript of record to be filed in the United States Circuit Court Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled proceeding and include in such transcript the following portions of said record:

1. Petition in reclamation and for accounting of San Diego Co-Operative Association.
2. Answer of Ancillary Receiver to such petition in reclamation.

3. Petition of Wm. H. Moore, Jr. as Ancillary Receiver, for order to show cause against San Diego Co-Operative Association.

4. Order to show cause issued on petition of Wm. H. Moore, Jr.

5. Report and recommendations of Special Master, filed May 16, 1922.

6. Report and recommendations of Special Master, filed June 16, 1922.

7. Exceptions of Ancillary Receiver to Special Master's report.

8. Memorandum of opinion of Judge Bledsoe, filed November 23, 1922.

9. Minute order confirming report of Special Master, dated November 23, 1922.

10. Order filed December 18, 1922, effective as of December 8, 1922.

11. Petition for allowance of Appeal and Order on same.

12. Assignment of Errors.

13. Citation on Appeal.

14. Statement of evidence under Equity Rule 75.

15. Praecipe for transcription of record.

Norman A. Bailie, Joseph

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Kirk and W. T. Craig,

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Attorneys for G. W. Brainard, Trustee in Bankruptcy of the Estate of Pacific Co-Operative League Stores, Inc., Bankrupt, and Petitioner on Appeal.



[TITLE OF COURT AND CAUSE.

PROOF OF SERVICE BY MAIL.

United States of America,                    )  
Southern District of California,        ) SS.  
Southern Division.                            )

JANE VARDIE being first duly sworn, deposes and says: That she is a citizen of the United States over the age of eighteen years and not a party to or interested in the above entitled action. That she served the attached Praeipie for Transcript of Record on Marcus W. Robbins and Elmer J. Hertel, Attorneys for said San Diego Co-Operative Association, by depositing a true and correct copy of said Praeipie for Transcript of Record, in an envelope addressed to Marcus W. Robbins and Elmer J. Hertel, Attorneys, McNeece Block, San Diego, California, and after securely sealing said envelope, so containing said Praeipie for Transcript of Record, and affixing thereon the postage required by law, she deposited said envelope so addressed and so containing said Praeipie for Transcript of Record, as aforesaid, in the United States mail, at Los Angeles, California, on this 25th day of May, 1923.

Further affiant saith not.

Jane Vardie.

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Subscribed and sworn to before me this 25th day of May, 1923.

(Notarial Seal)                               Olive Diffenderfer,  
Notary Public in and for the County of Los Angeles,  
State of California.

(Endorsed): Filed May 28, 1923. Chas. N. Williams, Clerk; by W. J. Tufts, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED  
STATES SOUTHERN DISTRICT OF CALI-  
FORNIA SOUTHERN DIVISION  
IN EQUITY F-99.

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In the Matter of the Petition of	)
Meyer Cloak & Suit Co., etc., et al,	)
for the appointment of Ancillary	)
Receiver for the PACIFIC CO-	)
OPERATIVE LEAGUE STORES.	)
INC.,	)
	)
	Bankrupt. )

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CLERK'S CERTIFICATE.

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 163 pages, numbered from 1 to 163 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, petition, answer, petition for order to show cause, order to show cause, report of special master, report and recommendation of special master, exceptions to report of special master, order confirming report of special master, statement of evidence, opinion, order, assignment of errors, petition and order allowing appeal, stipulation and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to and that said amount has been paid me by the plaintiff-in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this                      day of September, in the year of our Lord One Thousand Nine Hundred and Twenty-three, and of our Independence the One Hundred and Forty-eighth.

CHAS. N. WILLIAMS,  
Clerk of the District Court of the  
United States of America, in and  
for the Southern District of California.

By

Deputy.



IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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G. W. Brainard, as Trustee in Bank-  
ruptcy of the Pacific Co-Operative  
League Stores, Inc., Bankrupt,

*Appellant,*

*vs.*

San Diego Co-Operative Association,

*Appellee.*

---

OPENING BRIEF OF APPELLANT.

---

W. T. CRAIG,

JOSEPH KIRK,

NORMAN A. BAILIE,

*Attorneys for Appellant.*





**No. 4104.**

IN THE

**United States**

**Circuit Court of Appeals,**

**FOR THE NINTH CIRCUIT.**

---

G. W. Brainard, as Trustee in Bankruptcy of the Pacific Co-Operative League Stores, Inc., Bankrupt,

*Appellant,*

*vs.*

San Diego Co-Operative Association,

*Appellee.*

---

**OPENING BRIEF OF APPELLANT.**

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**INTRODUCTION.**

The Pacific Co-operative League and the Pacific Co-operative League Stores, Inc., two corporations, are in bankruptcy, the domiciliary trustee of the Pacific Co-operative League Stores, Inc. (G. W. Brainard, appellant herein), being located in San Francisco; Wm. H. Moore, Jr., being ancillary receiver in the Southern District of California, Southern Division.

Among the assets of the estate of said Pacific Co-operative League Stores, Inc., coming into the hands of said receiver were three grocery stores located in the city of San Diego, California. Prior to the filing of the petitions in bankruptcy hereinbefore referred to, and prior to the organization of the Pacific Co-operative League Stores, Inc., these three stores were in the possession of and were run under the name of Pacific Co-operative League, the other corporation hereinabove referred to. The Pacific Co-operative League transferred these stores to the Pacific Co-operative League Stores, Inc. Some time prior to the filing of the petitions in bankruptcy and the appointment of the ancillary receiver, these stores were attached by creditors of the Pacific Co-operative League Stores, Inc., and at the time of the appointment of the receiver they were in the possession of the sheriff under said attachment, and the receiver took them over from the sheriff.

After the appointment of said receiver and while he was in possession of said stores certain persons in San Diego designating themselves the San Diego Co-operative Association filed a petition and obtained an order to show cause on the receiver, said petition praying, among other things, that the ancillary receiver be directed to deliver to the petitioner, the San Diego Co-operative Association, said three stores.

The San Diego Co-operative Association is a voluntary association of individuals, which has not complied with the California statute in regard to fictitious partnerships.

The receiver filed an answer to the petition, and also on his own behalf filed a petition and obtained an order to show cause thereon directed to the San Diego Co-operative Association, said petition praying for an order to the effect that the San Diego Co-operative Association had no interest in said stores and that the said stores belonged to the estate of said bankrupt, Pacific Co-operative League Stores, Inc. The matter was referred to Glen H. Munkelt, Esq., as special master, and hearings were had before him. The special master filed a report and later filed his supplemental report in which he recommended among other things that an order be made directing the receiver to deliver said stores to the San Diego Co-operative Association. The report of the special master will be found on pages 22 to 51, inclusive, of the transcript. The ancillary receiver filed exceptions to the report of the special master, which exceptions will be found on pages 51 to 62, inclusive, of the transcript.

The report of the special master and the exceptions thereto were brought on for hearing before the Honorable Benjamin F. Bledsoe, judge of the United States District Court in and for the Southern District of California, and on the 8th day of December, 1922, Judge Bledsoe filed a memorandum opinion which will be found on pages 148 to 154, inclusive of the transcript, and also made an order affirming the special master's report and assessing on the receiver a penalty of five dollars for each exception or one hundred fifty dollars.

Thereafter, on stipulation and order of court thereon the trustee, G. W. Brainard, was substituted in said cause for the ancillary receiver and the appeal is being prosecuted in the name of the trustee.

On May 21, 1923, the trustee filed his assignment of errors, which assignment of errors will be found on pages 155 to 157, inclusive, of the transcript.

### STATEMENT OF THE CASE.

The Pacific Co-operative League, as heretofore stated, was a California corporation, with a regular board of directors. Its principal place of business was in San Francisco.

In the latter part of 1919 or the early part of 1920 one Mr. Hadlon came to San Diego and interested various labor unions there in the proposition of opening up a store or stores. Later a Mr. A. A. Johnson, a representative of the Pacific Co-operative League, came to San Diego and began taking subscriptions for what was called "loan capital," and in that way, by these subscriptions, raised a considerable amount of money, said subscriptions being made by various *individuals* and not by any *organization*. These subscriptions were for \$50.00 each; \$10.00 of each subscription was to be used as "associate membership" in the Pacific Co-operative League, and was to be used for educational purposes, and \$40.00 was to be used for the purpose of establishing a store or stores in San Diego. Subscriptions were taken in the following form:



“PACIFIC CO-OPERATIVE LEAGUE, INC.

No. 1752.

236 Commercial St. San Francisco.

Affiliated with the National and International Co-Operatives.

I, the undersigned, in order to assist in the establishment of the Co-Operative Store (branch of Pacific Co-operative League) at San Diego, hereby subscribe the sum of \$. . . . . of which \$10.00 is for associate membership and the balance for: . . . . . (State whether first payment on loan capital or new loan or installment) for investment by Pacific Co-operative League in said stores to be entitled to interest and privileges according to the by-laws.

I agree to pay of the above amount \$50.00 deposit with this application and the balance as follows:

Amount paid: \$50.00      Signed Chas. H. Peltcher.

Associate Member \$. . . . Address, Ocean Beach, S. D.

Loan Capital \$. . . . Received by A. G. Rogers,  
A. Johnson.

Loan \$      San Francisco, Cal.

Total \$. . . . . Feb. 14, 1920.

The white copy is the member's official receipt. The blue copy must be returned to the central office with cash, check or deposit slip. The yellow copy must be retained by the local store or field representative.”

The payment of \$40.00 was evidenced by a certificate in the following form:

“Co-Operation

Producer    Consumer

The link that binds.

PACIFIC CO-OPERATIVE LEAGUE, INC.

San Francisco, California.

Incorporated Oct. 13, 1913.    Not operated for Profit.

Certificate of Loan Capital (Without Liability)

Received of George F. Gray the sum of forty & 00/100 dollars \$40.00 as loan capital. This loan capital is to be invested in the Pacific Co-operative League for the use of the Co-operative store at San Diego, Calif. in accordance with the by-laws of the Pacific Co-operative League.

(The holder hereby agrees that this certificate is liable to forfeiture in the event the holder becomes indebted to the Pacific Co-operative League.) PACIFIC CO-OPERATIVE LEAGUE SEAL. San Francisco, California.

PACIFIC CO-OPERATIVE LEAGUE,  
Ernest O. F. Ames, President.

Attest: W. S. Huntington, Registrar.

Dated, San Francisco, Cal., Aug. 30, 1920."

It was understood that the subscribers to "loan capital" should receive five per cent interest on the loans, and as a matter of fact one payment of interest was made to the subscribers by the Pacific Co-operative League. They were also under the by-laws of the Pacific Co-operative League, entitled to receive a rebate from the local stores in proportion to the amount of goods purchased by them in said stores.

In all about 550 people subscribed for "loan capital." The money thus collected was placed in a bank in San Diego to the credit of the Pacific Co-operative League and by the Pacific Co-operative League withdrawn and placed in its general account in a bank in San Francisco. No subscriptions were made by the San Diego Co-operative Association as such. *All subscriptions were made by and as individuals.* The San Diego Co-operative Association in June, 1920, elected a board of directors, consisting of seven members. Later in

the summer of 1920 the local board of directors and Mr. A. A. Johnson, representative of the Pacific Co-operative League, opened negotiations for the purchase of three stores in San Diego from the Consumers Grocery Company, and entered into an agreement with said company, which will be found on pages 73 to 76, inclusive, of the transcript. This agreement, in order to be binding, had to be approved by the Pacific Co-operative League and it was so approved. A draft for \$1,000.00 was drawn by the San Diego Co-operative Association on the Pacific Co-operative League and the draft was paid.

Thereupon H. A. Floaten, a representative of the Pacific Co-operative League, came to San Diego, had an inventory taken and completed the deal, drawing drafts on the Pacific Co-operative League for the balance of the purchase price, except for a certain amount, approximately \$3,000.00, which was paid out of the proceeds of a special sale in the stores.

On September 1, 1920, the Consumers Grocery Company, from whom the stores were being purchased, caused to be executed and recorded in the office of the county recorder of the county of San Diego, a notice of intention to sell the stores herein involved to the *Pacific Co-operative League*. Thereafter, and on the 11th day of September, 1920, the Consumers Grocery Company executed to the Pacific Co-operative League a bill of sale in words and figures as follows, to-wit:

*"Know All Men by These Presents:*

That Consumers Grocery Co. (Inc.), 426 Market St., the parties of the first part, for and in consid-

eration of the sum of ten dollars of the United States of America, to us in hand paid by The Pacific Co-operative League (Inc.), the parties of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey, unto the said parties of the second part, its executors, administrators and assigns, one Ford delivery car, and the furniture and fixtures and grocery stock located in stores at 426 Market St., 620 Fifth St., 1033 Broadway (this bill of sale void in case of failure of the Pacific Co-operative League to pay draft drawn on San Francisco this date.)

To have and to hold the same to the said parties of the second part, its executors, administrators and assigns forever.

And they do for their heirs, executors and administrators, covenant and agree to and with the said parties of the second part, its executors, administrators and assigns, to warrant and defend the sale of said property, goods and chattels, hereby made unto the said parties of the second part, its executors, administrators and assigns, against all and every person or persons, whomsoever, lawfully claiming or to claim the same.

Witness our hands and seal this 11th day of Sept. 1920.

CONSUMERS GROCERY Co.,  
426 Market St.  
Justin Hammond, Pres.

(Reverse side):

Bill of Sale.

Consumers Groc. Co. to Pacific Co-operative League.  
Dated September 11th, 1920."



Thereupon the Pacific Co-operative League entered into the possession of the stores. The stores were insured in the name of the Pacific Co-operative League. The manager of the store was bonded to the Pacific Co-operative League. Employers' liability insurance was taken out in the name of the Pacific Co-operative League. The Pacific Co-operative League filed a tax statement with the tax assessor of San Diego county in its own name, and paid taxes on the stores. All goods were purchased in the name of the Pacific Co-operative League. The bank account at all times was carried in the name of the Pacific Co-operative League and checked out by its officers or employees, and at no time did the San Diego Co-operative Association or its board of directors or any of them, or any of its officers, have any right to check on the account of the Pacific Co-operative League.

The board of directors of the local association did not at any time assume or attempt to assume control of the stores.

Later and prior to the filing of the petition in bankruptcy the Pacific Co-operative League sold these stores, along with other assets, to the Pacific Co-operative League Stores, Inc., a California corporation, and approximately 275 holders of the "loan capital" certificates transferred their "loan capital" certificates and received in exchange therefor certificates of stock in the Pacific Co-operative League Stores, Inc.

All the persons who have furnished money or merchandise to either the Pacific Co-operative League or the Pacific Co-operative League Stores, Inc., are cred-



itors of these corporations. Credit was extended on the faith of the ownership of the stores by the two corporations above referred to. The legal title to the stores has at all times been in the Pacific Co-operative League or the Pacific Co-operative League Stores, Inc.

Notwithstanding all of these facts, the special master and the District Court found that the three stores were the property of the San Diego Co-operative Association and ordered the stores turned back to it, although *there is no evidence whatsoever to indicate that the San Diego Co-operative Association or any other association furnished any money whatsoever for the purchase of the stores, or ever claimed title to them until this litigation was commenced.*

The assignment of errors, which is found on pages 155 to 157, inclusive, of the transcript, is as follows:

### **Assignment of Errors.**

#### **I.**

"That the United States District Court for the Southern District of California, Southern Division, ERRED in overruling the exceptions of Wm. H. Moore, Jr., ancillary receiver herein, to the report and recommendations of Glen H. Munkelt, special master.

#### **II.**

That said court ERRED in confirming the report and supplemental report of said special master.

#### **III.**

That said court ERRED in denying the prayer of the petition of said Wm. H. Moore, Jr., as ancillary receiver herein for an order to show cause against said San Diego Co-operative Association and in discharging the rule of the order to show cause issued on said petition, and dismissing said petition.

IV.

That said court ERRED in ordering that said Wm. H. Moore, Jr., as ancillary receiver herein had no interest in or right to the possession of the stock in trade, furniture, fixtures, equipment, books of account, and other personal property belonging to the three (3) grocery stores situated in the city of San Diego, state of California, and generally known as numbers 618 Fifth street, 426 Market street, and 1033 Broadway.

V.

That said court ERRED in finding and ordering that the title to said three (3) stores was vested in said San Diego Co-operative Association and not in said Pacific Co-operative League Stores, Inc., and its successor, G. W. Brainard, trustee in bankruptcy of said Pacific Co-operative League Stores, Inc.

VI.

That said court ERRED in ordering said Wm. H. Moore, Jr., as ancillary receiver herein, to deliver possession of said three (3) stores to the said San Diego Co-operative Association, and in ordering said receiver to account to said association for the money taken in and paid out by him in the conduct of the business of said stores during his receivership.

VII.

That said court ERRED in not sustaining the exceptions filed for and on behalf of said ancillary receiver to the report and supplemental report of said special master.

VIII.

That said court ERRED in not ordering and decreeing that the title to said three (3) grocery stores is vested in the trustee in bankruptcy of the estate of said Pacific Co-operative League Stores, Inc., bankrupt, and in not holding that said San Diego Co-operative Association has no right, title or interest in or to said stores, or any part thereof.

## BRIEF OF THE ARGUMENT.

Counsel for appellant are at a loss to understand how either the special master or the District Court arrived at the conclusion that as against the trustee in bankruptcy the San Diego Co-operative Association, which paid not one dollar toward the purchase price of these stores or any of them and is not the assignee of any of the subscribers of "loan capital," can be held to be the owner of the stores.

Section 47 of the Bankruptcy Law as amended in 1910 provides that "Trustees, as to all property in the custody or coming into the custody of the Bankruptcy Court shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon." In other words, the trustee in bankruptcy and his agent, the ancillary receiver, stand in the position of a creditor of the Pacific Co-operative League, or the Pacific Co-operative League Stores, Inc., who had levied an execution on these stores. As we have heretofore stated, there was recorded in the office of the county recorder of San Diego county on the first day of September, 1920 [Tr. p. 33, Special Master's Finding No. 13], a notice of intention to sell these stores to the Pacific Co-operative League; the money with which these stores were purchased had been collected in the name of the Pacific Co-operative League, deposited in a bank in San Diego in the name of the Pacific Co-operative League, transferred to San Francisco to the general account of the Pacific Co-operative League [Tr. p. 138], com-

mingled with all the other funds of the Pacific Co-operative League [Tr. p. 138] and paid out of that general fund. It is significant that the contract of sale entered into by the San Diego Co-operative League (whose name was later changed to the San Diego Co-operative Association) was subject to the approval of the Pacific Co-operative League. [Testimony of J. N. Bischoff, Tr. p. 114.] Mr. Bischoff testified as follows:

“The agreement is made out in the name of the San Diego Co-operative Association and at the bottom of it there appears a clause ‘subject to the approval of the Pacific Co-operative League.’ Mr. Hammond asked us if we had full power to execute the contract. Mr. Johnson and myself stated that it must have the approval of the Pacific Co-operative League before it was of any effect. Mr. Justin Hammond asked members of the board of directors if they had full power to execute an instrument of this kind, and the reply was made by Mr. A. A. Johnson and myself that the agreement must have the approval of the Pacific Co-operative League before it had any effect.

After the agreement was signed, it was forwarded to the Pacific Co-operative League at its headquarters in San Francisco. The Pacific Co-operative League affirmed the contract by telegram.”

Mr. Bischoff for practically the entire time was a member of the board of directors and president of the San Diego Co-operative Association.

At the time this contract was signed and at the time the above statement was made there were present Mr. Justin Hammond (president of the Consumers Gro-



cery Company, the seller), Mr. Kinard, representing Mr. Hammond, Mr. A. A. Johnson, representing the Pacific Co-operative League, and the following members of the board of directors of the San Diego Co-operative Association: Mr. Webster, Mr. Eason, Mr. Barnes and Mr. Bischoff, being four members out of seven of the board of directors of the local association. Thus at the very outset notice was brought to the local association through a majority of the board of directors (Mr. Bischoff was president and Mr. Eason was secretary) that the title to the stores was to be taken in the name of the Pacific Co-operative League. From the time when the preliminary contract was entered into, the entire transaction was carried on by Mr. H. A. Floaten, a representative of the Pacific Co-operative League. [Tr. pp. 129, 130, 131, 132.] The bill of sale went direct to the Pacific Co-operative League. [Tr. pp. 131-2.] The local manager was employed by the Pacific Co-operative League. [Testimony of H. A. Floaten, Tr. p. 133.]

The insurance policies were immediately assigned to the Pacific Co-operative League. [Tr. pp. 139-140.]

Compensation insurance on the employees was carried in the name of the Pacific Co-operative League and the manager was bonded to the Pacific Co-operative League. [Tr. p. 140, last paragraph.]

### **Taxes.**

The Pacific Co-operative League paid the taxes on the stores. [Tr. p. 141.]



### **Interest on "Loan Capital."**

The money to pay interest on the "loan capital" certificates was paid out of the general profits of the business of the Pacific Co-operative League and not out of the profits of the local group. [Testimony of H. H. Dobbs, Tr. p. 141.]

### **Operation of the Stores.**

The stores were operated by the Pacific Co-operative League and later by the Pacific Co-operative League Stores, Inc., as above indicated, from the date of the bill of sale up to the time of attachment which was sometime prior to the filing of the petition in bankruptcy. The Pacific Co-operative League Stores, Inc., was adjudicated a bankrupt on the 22nd day of February, 1922, and the Pacific Co-operative League was adjudicated a bankrupt on or about the 15th day of March, 1922. [Tr. p. 146.]

### **Management.**

As heretofore stated, the manager was employed by and bonded to the Pacific Co-operative League. [Testimony of Walter Huggins, Tr. p. 94.] The bank account was at all times under the control of the Pacific Co-operative League.

"At all times I signed the checks on instructions from San Francisco as manager of the Pacific Co-operative League. I furnished a fidelity bond as manager of the store. The bond was in favor of the Pacific Co-operative League in San Francisco.

I made daily reports to the Pacific Co-operative League in San Francisco of the business done in the San Diego stores. \* \* \* I paid bills on instructions from San Francisco. Later they made a change and instructed me that all bills would be paid in San Francisco and not in San Diego except the small daily bills. Prior to that I paid the bills by checks of the Pacific Co-operative League signed by myself as manager. I never received instructions with regard to payment of bills from anyone except from the San Francisco office of the Pacific Co-operative League. The subject of my taking orders from the local board was never mentioned by the San Francisco office of the Pacific Co-operative League. The Pacific Co-operative League in San Francisco hired me and told me to come down and take charge of these stores and to make daily reports to them and make deposits in the bank in the name of the Pacific Co-operative League subject to my check as manager. *All bills which I received for goods purchased for the local stores on credit came to the Pacific Co-operative League.* [Testimony of Walter Huggins, Tr. pp. 94-95.]

### Creditors.

All of the creditors are creditors of the Pacific Co-operative League or its successor, the Pacific Co-operative League Stores, Inc. [Testimony of Walter Huggins, Tr. pp. 96-97.]

“The Pacific Co-operative League owes money for goods delivered to the San Diego Stores, purchased during the time I was in charge of the stores. Some of these debts have not been paid. I do not know about the rest. I sent most of them to San Francisco when they asked for them a couple of months ago.

To my knowledge they have not been paid. I do not believe they have. I do not know if the creditors of the local stores have filed claims in the bankruptcy court.” [Testimony of Walter Huggins, Tr. pp. 96-97; see also, testimony of H. A. Floaten, Tr. pp. 133-134.]

### **Deposit of Moneys.**

The local board of directors had knowledge that the funds were being handled in the name of the Pacific Co-operative League.

“My instructions to deposit the money coming from the store in the bank in San Diego and to draw checks against it came from San Francisco, from the office of the Pacific Co-operative League. *The president of the local board of directors was with me when I opened the account in the bank in San Diego.* It was upon instructions from the Pacific Co-operative League in San Francisco, I believe.” [Testimony of Walter Huggins, Tr. p. 97.]

The local board of directors knew that they had no control over the stores. [See testimony of J. N. Bischoff, Tr. pp. 115-116; testimony of Walter Barnes, Tr. p. 120; testimony of John S. Seibert, Tr. p. 123; testimony of Nora White Simpson, Tr. p. 127.] Bischoff, Barnes and Mrs. Simpson were all members of the board of directors of the local association.

### **“Loan Capital.”**

As heretofore stated, the “loan capital” was nothing but a loan on which interest was paid. Even assuming, for the sake of argument, that the San Diego

Co-operative Association is a party interested in this litigation, and assuming this money was advanced by it (which is not the fact) still we contend that as against the Pacific Co-operative League and its successor, the Pacific Co-operative League Stores, Inc., it could not claim title to these stores. The "loan capital" certificate, which is the written evidence of the subscription, provides that the money is subscribed as "loan capital" to be invested in the Pacific Co-operative League for the use of the co-operative store at San Diego, California, in accordance with the by-laws of the Pacific Co-operative League. [Tr. p. 31.] Interest at the rate of five per cent was paid on these loans. [Testimony of Stanley M. Gue, Tr. p. 90; testimony of Chas. J. Eason, Tr. p. 80.]

But as heretofore stated, the "loan capital" was not subscribed by the respondent herein, but by 550 different individuals [testimony of J. N. Bischoff, p. 113], and there is no evidence that respondent in any way represents or has authority to act for these 550 individuals. As a matter of fact, 275 of the 550 subscribers to this "loan capital" converted their "loan capital" certificates into stock in the Pacific Co-operative League Stores, Inc. and most of them received their stock. [Testimony of Walter Barnes, p. 117.] It is, therefore, our contention that the San Diego Co-operative Association has no capacity to sue, and that it has no standing in court, but is simply attempting to perform a vicarious service for 550 individuals, who have in no way transferred what interest they have to it.



### **Legal Title.**

The special master found "that at all times herein the Pacific Co-operative League has had the legal title to said three stores" [Tr. p. 50], and this finding was approved by the court along with all the rights or findings of the special master. It has been nowhere contended that the legal title to these stores ever was in any other person than the Pacific Co-operative League and the Pacific Co-operative League Stores, Inc., and that title passed by operation of law to the trustee, appellant herein.

### **Estoppel.**

As heretofore stated in this brief, the three stores in question were owned and controlled from September 11, 1920, until about January, 1922, by the Pacific Co-operative League, and the Pacific Co-operative League Stores, Inc. During that time, as heretofore pointed out, credit was extended to the Pacific Co-operative League and the Pacific Co-operative League Stores, Inc., on the faith of their ownership of this property. The local association and its board of directors had knowledge at all times of what was going on and that credit was being extended to the Pacific Co-operative League—and now when bankruptcy ensues, after practically a year and a half of silence, with the legal title admittedly in the bankrupts, the San Diego Co-operative Association now comes into a court of equity and prays that it (not its members nor the subscribers to "loan capital") should be de-



clared to be the owner of these stores; and that the people, who on the faith and credit of the ownership of these stores by the Pacific Co-operative League and the Pacific Co-operative League Stores, Inc., have become creditors of these bankrupts, should be deprived of the assets upon which they have a right to rely for the payment of their claims, and that the San Diego Co-operative Association, respondent herein, should take these stores free and clear of any claim whatsoever. Surely they do not come into equity with clean hands.

In Corpus Juris, Volume 21, page 1060, it is stated:

“If a person by his conduct induces another to believe in the existence of a particular state of facts and the other acts thereon to his prejudice, the former is estopped as against the latter to deny that that state of facts does in truth exist.”

See:

Wehrman v. Conklin, 155 U. S. 314;

U. S. v. West Side Irrigation Co., 230 Fed. 212.

It is a well-recognized principle that,

“He who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to keep silent.” (*Harris v. American Bldg., etc., Assn.*, 122 Ala. 545, 554, 25 So. 220.)

“One having a right to property \* \* \* must act with that degree of caution in making known his claim as will prevent others in ignorance of their rights from innocently making advances

upon the faith of it. If by his negligence men acting with ordinary prudence have in good faith obtained a right to the property, he cannot complain if he should be postponed to them." (Hughes v. McAlister, 15 Mo. 296, 55 Am. Dec. 143, 144.)

Vol. 21, Corpus Juris, p. 1156, section 158, reads as follows:

*"Personal Property.* Where one who owns or has an interest in personal property, with full knowledge of his rights, suffers another to deal with it as his own by selling or pledging it, or otherwise disposing of it, he will be estopped to assert his title or right as against a third person who has acted on the faith of and been misled by his acquiescence. Actual presence of the owner at the time of the sale is not indispensable. And in the application of the rule it is of no consequence that there was no actual intention to mislead or injure anyone."

Volume 21, Corpus Juris, p. 1169, section 175. reads as follows:

*"Negligence—In General.* A recognized proposition as to estoppel *in pais* is that if in the transaction itself which is in dispute a party has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led the other to act by mistake upon such belief to his prejudice, he cannot be heard afterward as against that other to show that the state of facts referred to did not exist. Since in order to create

an equitable estoppel it is not necessary that there should be an intentional moral wrong, negligence, when there is a duty cast upon a person to disclose the truth, may supply the place of intent, where the effect of such negligence is to work a fraud on the party setting up the estoppel."

Volume 21, Corpus Juris, p. 1172, section 177, reads as follows:

*"Clothing Another With Apparent Title or Authority—In General.* Where the true owner of property holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third persons are thus led into dealing with such apparent owner or person having such apparent power of disposition, they will be protected. However indisputable were the intentions of the owner not to surrender his ownership, when he has surrendered the possession and exhibited the person who has that possession to the world as one having the power to dispose of the property, he will not be heard against an honest buyer who acted upon the confidence imprudently reposed by the owner. In such cases the rights of such third persons do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing as against them the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

See:

*Porter v. Johnson*, 172 Cal. 456.

In *Morgan v. Chicago & Alton R. R. Co.*, 96 U. S. 743, the Supreme Court of the United States said:

“The appellee insists that the record discloses a case of estoppel *in pais* and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation.

“The principle is an important one in the administration of the law. It not infrequently gives triumph to right and justice where nothing else would save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent.

“He is not permitted to deny a state of things which by his culpable silence or misrepresentations he has led another to believe existed and who has acted accordingly upon that belief.

“The doctrine always presupposes error on the one side and fault or fraud upon the other and some difficulty of which it would be inequitable for the party against whom the doctrine is asserted to take advantage.” (Citing *Merchants Bank v. State Bank*, 10 Wall. 604.)

While not in any way controlling, either on the District Court or on this court, the attention of the court is respectfully directed to the opinion of Judge Bean in a case arising out of this same bankruptcy, in the state of Oregon, the only difference between it and the case at bar being that in the Oregon case the actual possession of the store was in the hands of the local group at the time of the filing of the petition in bankruptcy, while in this case the stores were in the pos-



session of the receiver. Judge Bean's memorandum of opinion is so significant and seems to counsel so much in point that it is quoted herein in full, as follows:

"In the matter of the Pacific Co-operative League Stores, Inc., it seems that some years ago a California concern operating under the name of the Pacific Co-operative League proceeded to organize various branch stores in various parts of the northwest, and among other places in La Grande. Their plan was to induce local people to pay a \$10.00 fee for becoming a member of the league, joining the league, or becoming a member thereof, and to loan to it \$50.00, with the accumulations of which the league purchased or established a local store. This method was followed in La Grande and a store was purchased and thereafter operated by the Co-operative League.

Later, sometime in 1921, the Co-operative League found it convenient for various reasons to organize another corporation called the Pacific Co-operative League Stores and this latter corporation took over the business of the former store, and among others the La Grande store, and continued to operate it until the spring of 1922, when it became financially embarrassed. The local persons interested in the La Grande store learning of that fact, concluded to take possession of the store and did so, and transferred it, or attempted to transfer it, rather, to the respondents in this case, and they subsequently transferred it, or attempted to transfer it, to a local corporation organized by them at La Grande.



“A receiver was appointed in California for the Pacific Co-operative League Stores and in an ancillary proceeding a local receiver was appointed. He demanded possession of the La Grande store and it was refused. Thereupon he filed a petition for an order requiring the defendants to turn the store over to him and they refused to do so. Issue was joined and the matter referred to a master, who heard the testimony, reported the facts and recommended that the prayer of the receiver be granted.

“Now the principal contention of the defendants is first that the La Grande store belonged to them, individually, and not to the Co-operative League; but that is not supported by the testimony at all. It is true they furnished the money—a part of it, at least, and perhaps all of it—but the store was really managed and controlled by the California corporation; reports were made daily to it; it drew the checks in payment of the bills; purchased by its own check the store at La Grande and managed and controlled it.

“Then it is contended that because the second corporation, or the Pacific Co-operative League Stores, never complied with the laws of Oregon by filing its articles of incorporation and otherwise fulfilling the requirements of the statute governing foreign corporations, that it had no legal right to do business in Oregon. But if that is true—and probably it is—it does not seem to me that it would be any excuse or justification for these defendants taking possession of this store without right or authority, and therefore the findings of the special master in that case will be affirmed.”

Judge Bean's opinion was called to the attention of Judge Bledsoe and reference to it will be found in Judge Bledsoe's memorandum opinion on page 151 of the transcript.

### **Agency.**

Respondent contended in its pleadings [see Tr. pp. 6, 8], and at the trial and the special master found [Tr. p. 46, Finding 5] that the Pacific Co-operative League was the agent or trustee of the San Diego Co-operative Association, respondent herein. The District Court in affirming the report of the special master also took the position that the Pacific Co-operative League was the agent or trustee of the San Diego Co-operative Association. Counsel for appellant contend that there is absolutely no evidence in the record upon which to base a finding of trusteeship or agency.

But, assuming for the sake of argument, that the Pacific Co-operative League was the agent or trustee of the San Diego Co-operative Association, nevertheless, it would not be entitled to an order directing the trustee in bankruptcy to deliver this personal property to it. The evidence from one end to the other shows that the San Diego Co-operative Association and the subscribers to the "loan capital" at all times had knowledge of the fact that these stores were being operated by the Pacific Co-operative League, and they must have known that debts were being contracted by said Pacific Co-operative League. Consequently, assuming respondent's own position, these debts were contracted by respondent's agent, with its knowledge

and with the knowledge of its members and on behalf of respondent, and the trustee in bankruptcy, standing as he does in the position of an attaching creditor attaching respondent's property for its own debt, certainly has a right to hold the property as against respondent.

We contend that the position taken by respondent herein, *viz.*: that it allowed the Pacific Co-operative League to operate and manage this property as its agent and accumulate debts, and then when catastrophe overtook the enterprise it has a right to claim the property as its own, free and clear of the debts created on its behalf, by its authorized agent, is a stench in the nostrils of any honest man, and should not be countenanced by a court of equity.

It is, therefore, respectfully submitted that the decision of the special master and the District Court should be reversed and an order made and entered herein decreeing that the three stores involved are the property of G. W. Brainard, trustee in bankruptcy of the Pacific Co-operative League Stores, Inc.; that the exceptions of the ancillary receiver to the special master's report should be sustained, and that the District Court should be declared to be in error, for all of the reasons set out in the assignment of errors herein.

Respectfully submitted,

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JOSEPH KIRK,

NORMAN A. BAILIE,

*Attorneys for Appellant.*



No. 4104.

IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

G. W. BRAINARD, as Trustee in Bankruptcy  
of the Pacific Co-Operative League  
Stores, Inc., Bankrupt,

*Appellant,*

vs.

SAN DIEGO CO-OPERATIVE ASSOCIATION,

*Appellee.*

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Brief of Appellee

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ELMER J. HERTEL,

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FILED

FEB - 7 1924

U. S. DISTRICT COURT  
SAN DIEGO, CALIF.





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Brief of Appellee

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INTRODUCTION

On or about the fifteenth day of December, 1921, the San Diego Co-Operative Association met and discharged the Pacific Co-Operative League as its trustee, and appointed the board of directors of the San Diego Co-Operative Association as its trustees to conduct the property in controversy in this case, consisting of three grocery stores located in the City of San Diego, California. They also appointed and authorized a committee to ascertain the proper legal procedure for discharging the Pacific Co-Operative League as their trustee and to obtain an accounting from said trustee.

An action was commenced in the Superior Court of San Diego County for this purpose. A temporary restraining order was granted by said court restraining the Pacific Co-Operative League from taking any stock or monies from said stores and ordering all monies impounded in a local bank. This order was later made permanent pending the final determination of the matter before the Superior Court. This matter has never been brought to trial because of the bankruptcy proceedings.

Soon after the granting of the injunction, creditors of the Pacific Co-Operative League attached the San Diego stores. The San Diego Co-Operative Association filed a third party claim, and the creditors filed a \$40,000.00 bond.

The Pacific Co-Operative League was organized as a non-profit association under the laws of California. Sometime in 1921, creditors of the League discovered it to be in an insolvent condition. The creditors knowing that the Pacific Co-Operative League was acting as trustee for local associations and that many local stores in San Diego and elsewhere were not assets of the Pacific Co-Operative League, demanded that the Pacific Co-Operative League devise some plan for the protection of the creditors.

The Pacific Co-Operative League then organized a profit corporation under the laws of the State of California known as the Pacific Co-Operative League

Stores, Inc. All of the assets and liabilities of the Pacific Co-Operative League, an insolvent non-profit association without capital stock, were turned over to the Pacific Co-Operative League Stores, Inc., in exchange for five hundred shares of the common stock of the Pacific Co-Operative League Stores, Inc.

Ownership of the local stores in San Diego and elsewhere is evidenced by what is known as a "LOAN CAPITAL CERTIFICATE".

The Pacific Co-Operative League, Inc. obtained a permit from the State Corporation Department of the State of California allowing said corporation to issue its capital stock in exchange for Loan Capital Certificates and to sell a certain amount for cash.

The Pacific Co-Operative League Stores, Inc. employed a large number of high pressure salesmen who used gross misrepresentation to induce holders of Loan Capital Certificates to exchange said certificates for stock in the Pacific Co-Operative League Stores, Inc. A large number were exchanged because of the misrepresentation used by the salesmen.

Because complaints alleging misrepresentation were made to the State Corporation Commissioner of the State of California, the permit to sell and exchange the stock of the Pacific Co-Operative League, Inc. was ordered revoked on the 11th day of February, 1922, by said commissioner.

The creditors then filed involuntary petitions in bankruptcy against the Pacific Co-Operative League, and the Pacific Co-Operative League Stores, Inc. Both were adjudicated as bankrupts, Wm. H. Moore, Jr., being ancillary receiver in the Southern District of California, Southern Division, G. W. Brainard, trustee.

The receiver for the bankrupt estates of the above named bankrupts took possession of the three grocery stores located in the City of San Diego, California, belonging to the San Diego Co-Operative Association, a voluntary association of persons holding and owning Loan Capital Certificates evidencing ownership of said three stores, and organized for the purpose of operating and managing said stores.

These stores were operated by the Pacific Co-Operative League as trustee. They originally operated under the name of the Consumers' Grocery Company. Later the name was changed to Pacific Co-Operative League, San Diego Branch, the name used by the San Diego Co-Operative Association at that time.

The Pacific Co-Operative League, without the knowledge or consent of the San Diego Co-Operative Association for which it acted as trustee, transferred the three stores belonging to the San Diego Co-Operative Association to the Pacific Co-Operative League Stores, Inc.



After the receiver took possession of the stores in question, the San Diego Co-Operative Association representing the owners of Loan Capital Certificates filed a petition in reclamation. The matter was referred to Glen H. Munkelt, Esq., as special master, and hearings were had before him. The special master filed his report and later filed his supplemental report in which he recommended among other things that an order be made directing the receiver to deliver said stores to the San Diego Co-Operative Association as representative of the owners and holders of Loan Capital Certificates. The ancillary receiver filed exceptions to the report of the special master.

The report of the special master and the exceptions thereto were brought on for hearing before the Honorable Benjamin F. Bledsoe, judge of the United States District Court, in and for the Southern District of California, and on the 8th day of December, 1922, Judge Bledsoe filed a memorandum opinion which will be found on pages 148 to 154, inclusive of the transcript, and also made an order affirming the special master's report and assessing on the receiver a penalty of five dollars for each exception or one hundred fifty dollars.

Thereafter, on stipulation and order of court thereon the trustee, G. W. Brainard, was substituted in said cause for the ancillary receiver and the appeal is being prosecuted in the name of the trustee.

On May 21, 1923, the trustee filed his assignment of errors, which assignment of errors will be found on pages 155 to 157, inclusive, of the transcript.

## STATEMENT

The local co-operative movement in San Diego grew out of the Federated Trades Council. This council appointed a committee in July, 1919, to investigate co-operation in general and report whether or not it would be advisable to form a local co-operative association to conduct a store or stores on the co-operative plan. The committee reported favorably. About this time there appeared in San Diego, a certain John A. Hadland. He assisted the committee then in existence in the formation of the present San Diego Co-Operative Association. The organization of the local association was completed about the 20th day of November, 1919. It was at that time called the San Diego Consumers' Co-Operative Association. (Testimony of Charles Henry Peltcher, Tr. p. 64; testimony of John A. Hadland, Tr. p. 66.)

On his way to San Diego from Alaska, Mr. Hadland had a conference with Mr. Ames, President of the Pacific Co-Operative League. Mr. Ames spoke of the possibility of Mr. Hadland doing co-operative work in San Diego and explained the Pacific Co-Operative League plan to him. Mr. Ames stated that the purpose of the Pacific Co-Operative League was to man-

age the stores of local associations, to train managers for this purpose, to give advice to organizations opening new stores, to promote the idea of co-operation, and to publish an organ spreading the work of co-operation, that the San Diego stores should be financed on a \$50.00 basis, \$10.00 for an associate membership fee in the Pacific Co-Operative League for services rendered to the local association by the league, \$40.00 was to be for goods on the shelves of the store or in other words, the property of the San Diego people. That in addition the members of the local association could vote 25 per cent of its capital for a wholesale, known as the Co-Operative Wholesale Company of San Francisco, a separate organization.

Mr. Hadland repeated the statements made by Mr. Ames on the league plan to prospective members at public meetings and personally. He also distributed about fifty copies of the By-Laws of the Pacific Co-Operative League given to him by Mr. Ames in Seattle. Later, Mr. Hadland distributed additional By-Laws of the Pacific Co-Operative League and other pamphlets explaining the League plan sent to him by Mr. Ames after his arrival in San Diego. (Testimony of John A. Hadland, Tr. pp. 66-68).

Mr. Hadland then circulated the following subscription list:

“This list is in charge of ..... No. 12.

“SAN DIEGO CONSUMERS CO-OPERATIVE  
ASSOCIATION.

Labor Temple, 621 Sixth Street.

“San Diego, California, Jan. 26th, 1920.

(Testimony of John A. Hadland.)

“We, the undersigned, hereby agree to subscribe for membership in the San Diego Branch Co-Operative store, and agree to pay thereon the sum of \$50.00 (fifty dollars) in cash or installments on receiving notice of collection from Mr. Johnson our BONDED ORGANIZER.”

(Tr. pp. 67-68.)

Mr. Hadland left San Diego about June 1, 1920, for Alaska in the employ of the Pacific Co-Operative League, where he was ordered by Mr. Ames and was sent a check for \$50.00 to pay his expenses to San Francisco where he reported to Mr. Ames. (Testimony of John A. Hadland, Tr. p. 70.)

After the preliminary work of Mr. Hadland, Mr. Ames, the President of the Pacific Co-Operative League and Mr. A. A. Johnson, the bonded organizer of the League, came to San Diego. They addressed various meetings explaining the league plan and the benefits to be derived by the local people through affiliation with the League. In addition to the representations made at these meetings, Mr. A. A. Johnson interviewed a large number of the local people personally and through his representations induced them to

subscribe loan capital to the local stores and to pay \$10.00 for an associate membership in the League.

Mr. Ames and Mr. Johnson both stated that under the League plan, the members of the local association would run the stores purchased with their money; that the league would act as trustees or agents, manage the stores, keep the books, furnish expert managers, promote the co-operative movement, furnish expert advice in the purchase of stores; that affiliated associations could purchase through the Co-Operative Wholesale thereby combining the buying power of a large number of stores and purchase cheaper than otherwise; that the league would keep an accurate check on the stock and prevent overstocking on the purchase of unsalable goods; that the Pacific Co-Operative League operated on the "Rochdale Plan". (Testimony of Charles J. Eason, Tr. pp. 71-74; testimony of W. S. Neal, Tr. pp. 87-89; testimony of Stanley M. Gue, Tr. pp. 88-91; testimony of Mrs. Bertha Gleason, Tr. p. 92; testimony of J. R. Dennison, Tr. pp. 143-145.)

In addition to these representations made by Mr. Ames, President of the Pacific Co-Operative League, Mr. Johnson and Mr. Hadland at public meetings and by personal interviews, pamphlets, By-Laws, copies of the Pacific Co-Operator, and other literature explaining the Pacific Co-Operative League plan were distributed among the San Diego people interested in co-operation.



“Page 2—By-Laws Pacific Co-Operative League:

“Second, *the purpose for which this Association is formed is to promote the theory of co-operation and to advance its practical development, to establish a central bureau of information, education, publicity and general service, and to provide literature and lectures; to assist co-operative movement; to act as organizer, promoters, advisers and auditors for Co-Operative Associations, and to assist dependent co-operative enterprises to work in unity with one another and to develop a federation of co-operative bodies for mutual advantage.*”

(Tr. p.70.)

Petitioners' Exhibit No. 14—Pacific Co-Operator March, 1921, Article by Mr. Ames: “The Pacific Co-Operative League adheres to all the fundamental principles of the Rochdale system, briefly the plan of operation of the Pacific Co-Operative League is as follows: In a local group, desirous of organizing a store it consults the home office of the Pacific Co-Operative League in San Francisco as to the minimum membership and capital required. Having been advised it usually obtains the assistance of a trained, salaried instructor to address meetings which assist local committees to secure the members and to raise the capital. *The funds are deposited in trust with the Pacific Co-Operative League and members credited.* In addition to the capital subscribed, members are required to pay a \$10.00 Association membership fee. This fee is

used by the home office to pay the incidental organization expenses, subscription to the official monthly organ, the Pacific Co-Operator, and to help defray expenses of general education work, of dues to the International Co-Operative Alliance, etc., a federated plan of the League as distinguished by modified form of federation. Local groups are autonomous, in that the responsibility for success or failure rests squarely on them. They are not autonomous in that they are not independent of other groups but are obliged to work in unity with the plans outlined by the combined groups of the Association. On the same principle, that the State of New Jersey is not autonomous political and geographical entity but an integral working part of an association of states, so a branch of the Pacific Co-Operative League is a unit in the federation of co-operative societies combined for mutual protection and progress. (Tr. pp. 98-100.)

Petitioners Exhibit No. 12, the Pacific Co-Operator, December, 1920, on front cover page: "The general work of the League consists of educating co-operators when they desire organizing into stores, groups and industries, and federating them for the development of better mutual service between producer and consumer, and the other accomplishment of the International Co-Operative Commonwealth. Experienced and capable advice offered to those wishing to organize for such purpose. Secure the best advice possible for starting a new Co-Operative organization."

“Pacific Co-Operator, July, 1920, Page 100: *“It is the general plan to deposit the funds collected for store establishment in a local bank to be held in trust by the League for the purpose for which it is subscribed.”*

Pacific Co-Operator, December, 1920, Page 192-193: “San Diego at the advice of the League spent a long time in preparing for its business career. Some may have been a little impatient with the delay but that is now forgotten and it is a long career ahead. The Board of Directors headed by President Bischoff is displaying the special business ability in the administration of its affairs with frequent meetings of the Board, prompt attention to business by Committees, its ample material with which to meet the members at their monthly meetings.” (Tr. pp. 99-101.)

Following these representations, money was collected and turned over to organizer A. A. Johnson, one of the representations of the Pacific Co-Operative League being that it would take care of the funds until they would be used to purchase a store or stores in San Diego. (Testimony of Charles J. Eason, Tr. p. 72.)

The subscribers to loan capital received a certificate called a “LOAN CAPITAL CERTIFICATE,” which was in the following form:

“CO-OPERATION.

“Producer

Consumer

The link that binds

“PACIFIC CO-OPERATIVE LEAGUE, Inc.

“San Francisco, Calif.

“Incorporated October 13, 1913. Not operated for profit.

“*Certificate of Loan Capital.*

“(without liability)

“Received of George F. Gray.

“(The holder hereby agrees that this Certificate is liable to forfeiture in the event the holder becomes indebted to the Pacific Co-Operative League)

“The sum of Forty & 99-100 Dollars \$40.00, as Loan Capital : This loan capital is to be invested in the Pacific Co-Operative League for the use of the Co-Operative Store at San Diego, Calif. in accordance with the By-Laws of the Pacific Co-Operative League.

“PACIFIC CO-OPERATIVE LEAGUE,

“Ernest O. F. Ames, President.

“Attest: W. S. Huntington, Registrar.

“Dated, San Francisco, Cal. Aug. 30, 1920.”

(Petitioner's Exhibit 9. Tr. p. 68.)

A committee was then appointed by the San Diego Co-Operative Association to investigate the purchase of stores. The committee considered a proposition submitted by Mr. Hammond for the purchase of the stores of the Consumers Grocery Company. They also asked that Mr. Floaten, an expert employed by the Pacific Co-Operative League, be sent to San Diego to give his advice on the purchase as that was one of the services offered by the League. Mr. Floaten reported favorably and the local Association made a further effort to

get sufficient funds to purchase the stores. (Testimony of Charles J. Eason, Tr. pp. 77-79.)

The following is from the minutes of the Directors' meeting of the San Diego Co-Operative League now known as the San Diego Co-Operative Association, of August 9th, 1920:

"Organizer Johnson stated: That Mr. Hammond, the proprietor of the Consumers' Grocery Company's stores, requested that we give him a definite answer in regard to our intention of purchasing the stores. Mr. Johnson also reported: That up to the present time only \$13,000.00 of the loan capital had been paid in, this amount includes the \$2,000 special loan of the Carpenters' Union. In view of this fact, it will be necessary for the Consumers' Grocery Company to reduce their stock to \$14,000 before we could purchase it.

"Moved by Director Rogers, seconded by Director Barnes that the entire Board of Directors act as a Committee to make the necessary arrangements for the purchase of the three stores of the Consumers' Grocery Company and that the acts of the majority of the Committee be binding. Motion carried.

"The President stated that unless objection was made, the consent of the Board of Directors, hereby granted, authorizing the President and Secretary to draw on the Pacific Co-Operative League for \$1,000.00



in favor of the Consumers' Grocery Company, this payment being necessary to the binding of the purchase agreement for the three stores this payment not to be made unless the purchase terms are satisfactory to the Committee. There being no objection it was agreed to.

"Moved by Director Webster, seconded by Director Barnes; that notice be sent to the Pacific Co-Operative League of the purchase of the stores and that they be requested to send a League representative here to superintend their opening. Motion carried." (Tr. pp. 78-80.)

The San Diego Co-Operative Association then entered into an agreement with the Consumers' Grocery Company to purchase the certain grocery stores mentioned in this proceeding. Said agreement was in the following form:

#### "CONTRACT AND AGREEMENT.

August 11, 1920.

"1. THIS CONTRACT AND AGREEMENT entered into this date between the Consumers' Grocery Company, Inc., hereinafter known as the party of the first part, and the San Diego Co-Operative Association, party of the second part, Witness:

"2. In receipt of \$1,000.00 (One Thousand Dollars) the party of the first part gives the party of the second part an option to purchase the stock and fixtures located at 426 Market Street, 618 Firth Street and the S. W. Corner of Broadway and Eleventh St.

"3. It is understood and agreed by both parties that this option expires in thirty (30) days from this date (August 11, 1920).

"4. The party of the first part agrees to sell to the party of the second part the stock of merchandise located in the three stores enumerated in paragraph 2 at the present market price per pound, per dozen, per case or per gallon, at the wholesale jobbers price list of the City of San Diego.

"5. Both parties agree to name the following committee of three men, who are in the wholesale grocery business, to price this inventory:

"H. A. Floaten, or other representative of the Pacific Co-Operative League.

"Charles P. Morse, of Klauber-Wangenheim Company.

"H. G. Brohm, of Klauber-Wangenheim Company.

"6. Both parties agree to the price that this Committee places on the merchandise as per agreement in paragraph 4.

"7. The expense of the work done by this Committee to be divided equally between both parties.

"8. All insurance, public liens, telephone, electric light, gas, rent and or any other prepaid item to be pro rated to the date of the consummation of the purchase.

"9. All returnable containers to be taken up in the stock inventory at their cash value, such as barrels,

bottles, jugs, cans and or any other items of such nature.

"10. Paper bags, paper, wrapping twine, register tape and or any other material necessary to the operation of the grocery business to be taken up in the stock inventory at the present market price per pound, as per the wholesale price lists.

"11. The party of the first part hereby acknowledges to the party of the second part receipt of \$1,000.00 (One Thousand Dollars), being payment for the option covered in paragraph 4.

"12. At the time this sale is consummated, provided it is consummated within the time limit, it is understood by both parties that the One Thousand Dollars paid in by the party of the second part shall constitute the first payment.

"13. It is understood and agreed by both parties that upon payment of an additional \$12,000.00 (Twelve Thousand Dollars," if there should be any, that the party of the first part, making a total paid in of \$13,000.00 (Thirteen Thousand Dollars), the business of the three stores as enumerated in paragraph 2, will be turned over to the party of the second part.

"14. It is further understood and agreed that the unpaid balance over a total of \$13,000.00 (Thirteen Thousand Dollars, if there should be any, that the party of the second part will turn over to the party of the first part the total daily cash sales each day un-

til the balance is paid in full; in no event shall the purchase price exceed the sum of \$15,000.00 (Fifteen Thousand Dollars).

"15. In the event that the stock and fixtures should inventory less than the amount paid in, namely, \$13,000.00 (Thirteen Thousand Dollars), by party of the second part, the party of the first part will give to the party of the second part a check covering the difference.

"16. It is understood and agreed that the fixtures of the three stores enumerated in paragraph 2 shall be included in the inventory at \$5,000.00 (Five Thousand Dollars), the fixtures to be those as shown on the list attached to this agreement.

"Consumers Grocery Company, Inc.,

"By Justin W. Hammond.

".....

"Justin W. Hammond, President.

"San Diego Co-Operative Association,

"By J. N. F. Bishoff, President.

"Chas. J. Eason, Secretary.

"San Francisco, Cal.

"The above Agreement approved this date.

"Pacific Co-Operative League,

"By....." (Tr. pp. 73-77.)

The President and Secretary of the San Diego Association were duly authorized to draw on the Pacific Co-Operative League for \$1,000.00 in favor of the

Consumers Grocery Company to bind the agreement to purchase. Notice was sent to the Pacific Co-Operative League of the purchase of the stores and they were requested to send a League representative to superintend their opening. (Minutes of the Directors' Meeting of the San Diego Co-Operative League, August 9, 1920, Tr. pp. 79.)

All of the money used in the purchase of the stores was furnished by the San Diego Association. At the date of the purchase of the stores, \$15,393.00 in cash was paid on subscriptions: \$2,000.00 borrowed by the local Association on a note from Templeton Johnson; \$17,393.00 total cash to credit of local Association; inventory showing a total value of \$21,616.38; \$5,476.36 taken from cash receipts from operation of stores; actual purchase price paid in drafts on Pacific Co-Operative League \$16,140.02; leaving a balance of \$1,252.98 surplus to the credit of the local Association after the stores were purchased. (Stipulation of Facts, Tr. p. 147.)

The notice of sale and the bill of sale were executed in the name of the Pacific Co-Operative League without the knowledge of the San Diego Association. (Testimony of H. A. Floaten, Tr. p. 135; testimony of Charles J. Eason, Tr. p. 80.)

Complying with the request of the San Diego Association, the League sent Mr. H. A. Floaten, a store supervisor, to San Diego to get the stores started.



To increase the membership in the San Diego Association and the capital in the stores, Mr. A. A. Johnson, a representative of the Pacific Co-Operative League, and with the knowledge of Mr. H. A. Floaten, the following sign was ordered by Mr. Johnson and placed upon the largest store, located on Broadway, one of the principle thoroughfares in San Diego, remaining there for more than one year and still there at the time this proceeding was begun:

PETITIONERS' EXHIBIT No. 6  
"TO REDUCE THE COST OF LIVING  
"THIS STORE OWNED AND OPERATED BY  
"500 FAMILIES.

"Ask the Clerk how you can join them."

(Testimony of Walter Huggins, Tr. p. 96; testimony of H. A. Floaten, Tr. p. 134.)

After the purchase of the stores, the manager made regular reports to the local board of directors on the condition of the business, finances, etc. Several inventories were taken by the local board of directors. All correspondence from the League concerning the stores was addressed to the San Diego Association or one of its officers. Bills were authorized to be paid by the local board. The Pacific Co-Operative League recognized the members of the local Association as an entity and not as a number of individuals that loaned money to the League. (Minutes of the Directors' meeting of the San Diego Co-Operative League, Aug-

ust 9, 1920, Tr. pp. 78-80; tr. pp. 85-87; testimony of Stanley M. Gue, Tr. p. 91; testimony of Walter Hugins, Tr. pp. 94-96; Petitioners' Exhibit No. 21, Tr. pp. 100-103; Minutes of meeting of Board of Directors, San Diego Association, December 2, 1920, Tr. p. 103; testimony of J. N. Bischoff, Tr. pp. 115-117; testimony of John S. Seibert, Tr. pp. 123-126.)

The Board of Directors of the San Diego Association computed the amount to be paid the members as rebates on profits on their stores according to their purchases, after first deducting 5 per cent interest due on Loan Capital. They then sent these amounts to the Pacific Co-Operative League for payment. The Board decided on the amount to be distributed. The San Diego people did not share in any of the profits of other local groups or in the profits of the Pacific Co-Operative League, neither were the bills of the San Diego stores or the interest due on Loan Capital paid from any other source than the earnings of the local stores in San Diego. The following is a copy of the form used in paying interest on loan Capital Certificates and rebates to members of the local Association:

“Pacific Co-Operative League

“(Signed) Ernest Ames

“San Diego Branch

“When Redeemed Manager Must Forward with Daily  
“Report.

The reverse side of Exhibit reads as follows:

“(1) Added Capital

"Please place to credit of loan capital in my name.

"Name .....

"(2) Redeemed in Cash.

"Name (Signed) Stanley M. Gue.

"(3) Redeemed in Mdse.

"Name .....

The second sheet of aforesaid exhibit is in words and figures as follows, to-wit:

"No. 58 To Be Cashed at Store only.

"Pacific Co-Operative League,

"San Francisco, Dec. 31, 1920.

"To the Manager of San Diego Branch:

"Pay to, or Credit W. B. Jones - - - - \$17

" ————— Seventeen Cents ————— Dollars.

"being in full payment of dividend and interest to December 31st.

" 1. This can be added to members' share .

" 2. It can be taken out in trade by member, or .

" 3. It can be exchanged for cash. .

" Member will strike out the line not wanted and .

" sign here in full settlement. .

" .....

" .....

"Pacific Co-Operative League

"(Signed) Ernest Ames

"San Diego Branch

"When Redeemed Manager Must Forward with Daily Report.

"(over)"

The reverse side of Exhibit reads as follows:

“(1) Added Capital

“Please place to credit of loan capital in my name.

“Name .....

“(2) Redeemed in Cash

“Name .....

“(3) Redeemed in Mdse

“Name .....

### Petitioners' Exhibit No. 16

(Testimony of Charles J. Eason, Tr. pp. 80, 83; minutes of the members' meeting of the San Diego Association, dated Feb. 17, 1921, Tr. pp. 80, 81; testimony of Stanley M. Gue, Tr. pp. 90-91; testimony of Charles J. Mays, Tr. pp. 92, 93; testimony of A. A. Johnson, Tr. p. 110; testimony of John S. Seibert, Tr. p. 125; testimony H. H. Dobbs, Tr. p. 142.)

The By-Laws of the Pacific Co-Operative League provide that upon the dissolution of any store or stores belonging to a local Association, the monies received for same are to be pro-rated among the holders of Loan Capital Certificates in said group or Association and the manner in which local associations and stores are organized. (Tr. p. 102.)

By-Laws. “Article 9, Section 3, Operation of branches. In order to permit the operation of branch stores by association members as provided in Article 2, Section 2, it is hereby provided that the Board of Di-

rectors may, upon request from a group of associate members, order a survey of any district selected for a branch store, to be made, decide the number of members and the capital required to operate such branch.” (Tr. p. 102.)

By-Laws Pacific Co-Operative League, Section 4, Article 9:

“Each local branch upon being admitted into the Pacific Co-Operative League shall transfer to the League the funds collected as loan capital for the establishment of its store, for which there shall be immediately issued membership Loan Capital Certificates. The central Board of Directors of the Pacific Co-Operative League which then proceeds to institute the store and shall provide equipment and stock for the same with the funds as above provided, etc.” (Tr. p. 135.)

The merchandise for the San Diego stores was purchased almost entirely in San Diego from local wholesalers, a small portion in Los Angeles. The only creditors of the San Diego stores are local wholesalers who believed that said stores were owned by the San Diego people at the time they extended credit, and who did not file claims against the bankrupt estate. (Testimony of Walter Huggins, Tr. pp. 94, 95; testimony of Walter G. Gastil, Tr. p. 97.)

The name of the local Association in San Diego was changed at various times but the Association re-



mained the same. First, it was known as the San Diego Consumers' Co-Operative Association, then the San Diego Co-Operative League, then the San Diego Branch of the Pacific Co-Operative League and later to the San Deigo Co-Operative Association. (Testimony of Charles J. Eason, Tr. p. 73.)

From the 11th day of September, 1920, until sometime in November the name of the Consumers' Grocery Company on the stores was not changed. Because of the fact that members of the local Association were confused and purchased at another store nearby through mistake, Manager Floaten recommended to the local association that they place large signs on the stores carrying the name of the San Diego Association which was at that time known as the San Diego Branch of the Pacific Co-Operative League. On November 12, 1920, the Board of Directors of the San Diego Association passed a resolution that signs should be placed on the stores to read "San Diego Branch, Pacific Co-Operative League, Store No. 1, Store No. 2, and Store No. 3 respectively. (Tr. p. 85.)

Daily cash receipts from the stores were sent to the Pacific Co-Operative League in San Francisco as Trustee. The bills of the San Diego stores were paid by the league out of the monies belonging to the San Diego Association. The bills were paid for a while, then notwithstanding the fact that there was more than sufficient money to the credit of the San Diego stores

held by the League, the bills were not paid. The San Diego creditors began to press the local Association for their money. Believing that the Pacific Co-Operative League had violated its trust, the San Diego Association discharged the Pacific Co-Operative League as its Trustee and demanded an accounting. A Legal Committee was appointed to take necessary action toward this end. The League was notified of its discharge and demand made for the stores. This was refused. An action asking for an accounting and a dissolution of the trust relationship was then commenced in the Superior Court of the County of San Diego, State of California. An injunction was granted by said Court against the Pacific Co-Operative League, prohibiting the League from removing any stock or monies except in the usual course of business and ordering all monies impounded in a local bank in San Diego, pending the trial of the case. (Minutes of meeting of San Diego Association, Dec. 15, 1921, Tr. p. 91; testimony of Walter Huggins, Tr. p. 94.)

The Pacific Co-Operative League was a non-profit association incorporated as such, without capital stock under the laws of the State of California. Its capital consisted of money obtained through membership payments. (Petitioners' Exhibit No. 31, Tr. p. 102).

The creditors of the Pacific Co-Operative League discovered that the League was under financial difficulties and demanded protection. They did not believe that they were adequately safeguarded under the form of or-

ganization of the League as its total assets consisted of money obtained through membership payments by associate members. (Petitioners' Exhibit No. 21, Tr. p. 102; By-Laws of the Pacific Co-Operative League, Tr. pp. 70, 102.)

A profit corporation was then organized under the laws of the State of California, known as the Pacific Co-Operative League Stores, Inc. The plan of the Pacific Co-Operative League was to obtain the ownership and control of the stores in San Diego and elsewhere by exchanging the capital stock of the new corporation for "Loan Capital Certificates".

A permit was obtained from the State Corporation Department of California allowing the new corporation to exchange its stock for Loan Capital Certificates, and to sell a certain amount in addition for cash.

A number of high pressure stock salesmen were employed for this purpose. To induce holders of Loan Capital to exchange their certificates for stock, all sorts of misrepresentations were used. Because of said misrepresentations, the State Corporation Commissioner revoked the permit of the Pacific Co-Operative League Stores, Inc. on the 11th day of February, 1922. (Tr. p. 43.)

On or about the 1st day of November, 1921, the Pacific Co-Operative League attempted to sell to the Pacific Co-Operative League Stores, Inc., the San Diego stores without the knowledge or consent of the

San Diego Association or the holders of Loan Capital in San Diego.

The creditors then filed involuntary petitions in bankruptcy against the Pacific Co-Operative League, and the Pacific Co-Operative League Stores, Inc.

### **BRIEF OF ARGUMENT**

Counsel for the appellant appears to be taking this appeal on the ground that there is insufficient evidence to support the conclusions of the Special Master and the District Court.

This is a proceeding in equity. We contend that we have an equitable title to the stores in question; that the Pacific Co-Operative League was employed by and acted as Trustee for the San Diego Co-Operative Association for the purpose of operating and managing the three grocery stores in San Diego for the benefit of the members of the San Diego Association.

#### **Organization of San Diego Association**

The local Association in San Diego was originally known as the San Diego Consumers Co-Operative Association. The original organization was perfected about the 20th day of November, 1919. (Testimony of John A. Hadland, Tr. p. 66.)

Later the name of the organization was changed to the San Diego Co-Operative League, San Diego Branch of the Pacific Co-Operative League and then

to the present name San Diego Co-Operative Association. (Testimony of Chas. J. Eason, Tr. p. 73.)

It is a voluntary association of the holders of "Loan Capital Certificates". It was organized by them so as to have a central body to protect their interests, represent them in the selection and purchase of a store or stores, the employment of proper management, to carry out their wishes in the conduct and policies of stores purchased by them.

They held regular meetings, elected officers and a Board of Directors to represent them, appointed a committee to investigate the purchase of stores, authorized said committee to purchase what they deemed best, an agreement was signed by the President and Secretary of the Association as such, for the purchase of stores, heard reports on the financial condition of the stores by the manager, took inventory, determined the amount of profit of the stores, determined the amount of said profits to be set aside for depreciation, interest, surplus, education, and after said deductions, to be paid back to the members in the form of rebates on their purchases and did other things necessary to the proper conduct of the business. They were recognized by the Pacific Co-Operative League as an entity through correspondence addressed to the San Diego Association and the officers of said Association as such. Mr. Ames President of the League and other representatives addressed meetings of the local Association. The League



recognized and paid drafts drawn on the League, for the purchase of the stores, by the San Diego Association. They sent League experts to advise in the purchase, and opening of the stores at the request of the local Association. They requested permission of the San Diego Association to allow them to use some of the funds belonging to said Association to pay the expenses of Mr. Ames, President of the Pacific Co-Operative League incurred by his trip to Cleveland in the interest of co-operation. They recognized the San Diego Association in the official organ of the League, known as the Pacific Co-Operator, and in other transactions natural to the conduct of the stores in San Diego. Counsel for the appellant contend that there is no entity but that all transactions with reference to the stores in question were between the Pacific Co-Operative League and a number of individuals in San Diego; that the League never had any dealings with the San Diego Co-Operative Association and that they cannot understand how either the Special Master or the District Court arrived at the conclusion that the stores were the property of the holders of Loan Capital Certificates and should be returned to the San Diego Co-Operative Association as their representatives. (First subscription list, Tr. p. 67; testimony of Charles J. Eason, Tr. pp. 71-74, 76-82, 83; Minutes of meeting of San Diego Association, September 16, October 14, November 12, December 16, 1920, Tr. p. 85; testimony of Stanley M. Gue, Tr. p. 88, 90, 91; testimony of Walter Huggins, Tr. pp. 94-96; Pacific Co-Operator,

December, 1920, p. 192-193, Tr. pp. 99, 100; Pacific Co-Operator, February, 1920, Tr. p. 100; Petitioners' Exhibit No. 25, Tr. p. 100; Petitioners' Exhibit No. 21, several letters to local Association, Tr. pp. 100-103; Minutes of meeting of Directors San Diego Association, December 2, 1920; Tr. p. 103; testimony of Monott Romaine, Tr. p. 104; testimony of J. N. Bischoff, Tr. 115; Tr. p. 147.)

### **Representations**

The San Diego people were induced to affiliate with the Pacific Co-Operative League through the representations made by Mr. Ames, Mr. Johnson and other representatives of the League made in personal interviews and at meetings of the San Diego Association. Also through articles published in the Pacific Co-Operator, By-Laws of the League distributed in San Diego and other literature, and by reason of a sign placed on the largest store by Mr. Johnson with the knowledge of Mr. H. A. Floaten, another League representative. (Testimony of Charles H. Peltcher, Tr. pp. 64-66; testimony of John A. Hadland, Tr. pp. 66-68; testimony of Charles J. Eason, Tr. pp. 71-74; testimony of W. S. Neal, Tr. p. 87; testimony of Stanley M. Gue, Tr. 88-91.) The plan of operation of the Pacific Co-Operative League as represented was:

### **League Plan**

“Page 2—By-Laws Co-Operative League:

“Second, the purpose for which this Association is formed is to promote the theory of co-operation and to advance its practical development, to establish a central bureau of information, education, publicity and general service, and to provide literature and lectures; to assist co-operative movement; to act as organizer, promoters, advisers and auditors for Co-Operative Association, and to assist dependent co-operative enterprises to work in unity with one another and to develop a federation of co-operative bodies for mutual advantage.” (Tr. p. 70.)

Petitioners' Exhibit No. 14—Pacific Co-Operator, March 1921, Article by Mr. Ames:

“The Pacific Co-Operative League adheres to all the fundamental principles of the Rochdale system, briefly the plan of operation of the Pacific Co-Operative League is as follows: In a local group, desirous of organizing a store it consults the home office of the Pacific Co-Operative League in San Francisco as to the minimum membership and capital required. Having been advised it usually obtains the assistance of a trained, salaried instructor to address meetings which assist local committees to secure the members and to raise the capital. The funds are deposited in trust with the Pacific Co-Operative League and members credited. In addition to the capital subscribed, members are required to pay a \$10.00 Association membership fee. This fee is used by the home office to pay the incidental organization expenses, subscription to the

official monthly organ, the Pacific Co-Operator, and to help defray expenses of general education work, of dues to the International Co-Operative Alliance, etc., a federated plan of the League as distinguished by modified form of federation. Local groups are autonomous—in that they are not independent of other groups but are obliged to work in unity with the plans outlined by the combined groups of the Association. On the same principle, that the State of New Jersey is not autonomus political and geographical entity but an integral working part of an association of states, so a branch of the Pacific Co-Operative League is a unit in the federation of co-operative societies combined for mutual protection and progress.” (Tr. pp. 98, 99.)

Pacific Co-Operator, July 1920, page 100: “It is the general plan to deposit the funds collected for store establishment in a local bank to be held in trust by the League for the purpose for which it is subscribed.” (Tr. p. 99.)

The following sign was placed on the largest store to attract new members by Mr. A. A. Johnson with the knowledge of Mr. H. A. Floaten. It was on the store for more than two years:

Petitioners’ Exhibit No. 6:

“TO REDUCE THE COST OF LIVING  
“THIS STORE OWNED AND OPERATED BY  
“500 FAMILIES.

“Ask the Clerk how you can join them.”

(Testimony of Walter Huggins, Tr. p. 96; testimony of H. A. Floaten, Tr. p. 136.)

The League plan as represented by Mr. Ames, Mr. Johnson and others at meetings and through personal contact was: that the Pacific Co-Operative League operated under the "Rochdale System"; that by affiliating with the League the local Association would be affiliating with many other similar associations; that by so doing they could combine their buying power and purchase merchandise through a co-operative wholesale operated by but not a part of the Pacific Co-Operative League in San Francisco and purchase cheaper than through local wholesalers; that the League had a special system of accounting and would keep an accurate account of the stores' business, an accurate account of the stores' stock, and see that the stores did not over-buy, or become stocked up with unsalable merchandise; that accounts were so kept that a manager could not default without being discovered; that auditors came from time to time to audit the books and statements would be furnished to the local people; that the League was educational; that its purpose was to help organize other groups; that when a sufficient number of local associations were established in southern California, they could vote 25 per cent of their capital and organize a wholesale at Los Angeles for their benefit; that the League was an incorporated body and was authorized by law to act as trustees of the funds and managers of the local stores in the same manner as a



bank or trust company; that the League furnished trained managers; that they would send a bonded organizer to receive the Loan Capital and place it in escrow in a bank until the San Diego people were ready to buy a store; that they would send an expert to assist in purchasing a store in a proper location.

Counsel for appellant contends that the purpose of the Pacific Co-Operative League was not to act as agents or trustees but to own and operate stores and that there is no evidence to the contrary. (Testimony of Charles Henry Peltcher, Tr. pp. 64-66; testimony of John A. Hadland, Tr. pp. 66-68; testimony of Charles J. Eason, Tr. pp. 71-74; testimony of W. S. Neal, Tr. pp. 87-88; testimony of Stanley M. Gue, Tr. pp. 88-91; testimony of J. N. Bischoff, Tr. p. 113; testimony of Walter Barnes, Tr. pp. 118, 119, 120; testimony of John S. Seibert, Tr. pp. 122, 124.)

### **Purchase of Stores**

The San Diego Association appointed a committee to investigate the purchase of a store or stores, and authorized said persons to purchase for the local Association. An agreement was entered into between the San Diego Association and the Consumers Grocery Company to purchase three grocery stores. It was signed by the President and Treasurer of the local Association as such. There was no approval by the Pacific Co-Operative League as the instrument itself shows on its face. This matter was suggested and

the statement made by the persons present that it should be approved because the local Association wanted the expert advice of the League to which they were entitled. The San Diego Association authorized the purchase, ordered a draft drawn for \$1,000.00 on the League and requested that the League send an expert to open the stores and protect the interests of the San Diego people. (Tr. pp. 73-77; testimony of Charles J. Eason, Tr. pp. 77, 80; minutes of Directors meeting San Diego Association August 9, 1920, Tr. pp. 78, 79; testimony of Charles J. Eason, Tr. p. 145.)

The San Diego Association paid for the stores with money subscribed by San Diego people and a loan made by the San Diego Association from a man named Templeton Johnson. The Pacific Co-Operative League did not contribute one cent toward the purchase of the stores. After the stores were fully paid for, the San Diego Association still had a balance of \$1,252.98 to its credit. (Stipulation of Facts, Tr. p. 147.)

Notwithstanding the fact that counsel for the appellant contend that the Pacific Co-Operative League purchased the stores, they have stipulated to the above.

### **Creditors**

Considerable stress is laid upon this point by opposing counsel. They state that creditors of the Pacific Co-Operative League extended credit on the faith that the League owned the stores in San Diego. They have introduced absolutely no evidence to substantiate this contention.

We do not know who the creditors of the Pacific Co-Operative League are. None of these creditors were produced at the hearing of this matter to testify as to facts leading them to extend credit to the Pacific Co-Operative League.

The stores in San Diego purchased almost all of their stock from the San Diego wholesalers. A small amount was bought in Los Angeles. (Testimony of Walter Huggins, Tr. p. 94.)

The creditors of the San Diego stores extended credit to them on the faith that the stores were owned by the San Diego people. At the time of the hearing of this matter, none of them had filed claims against the estate of the Pacific Co-Operative League or League Stores, Inc. (Testimony of Walter G. Gastil, Tr. p. 97; testimony of Walter Huggins, Tr. p. 97.)

The sign on the largest store stating that it is owned by 500 families is visible to persons and firms doing business with the San Diego stores.

There is no evidence that the Pacific Co-Operative League even contracted any liabilities for the benefit of the San Diego Association.

The League sent a circular letter addressed, "To the firms with whom we are doing business", which stated that the Pacific Co-Operative League had no capital stock and that its entire capital consisted of monies raised by membership payments. (Petitioners' Exhibit No. 21, Tr. p. 102.)

The Pacific Co-Operative League was incorporated under the laws of the State of California. Its purpose is clearly stated in the By-Laws (Tr. p. 70.)

Its plan of operation was also explained in many issues of the Pacific Co-Operator, the official organ of the League. (Tr. p. 98, 99.)

The books of the Pacific Co-Operative League were open to the inspection of creditors. We do not believe that any creditors of the League extended credit on the faith that the League owned the San Diego stores.

The evidence shows that creditors of the San Diego stores extended credit on the faith that they were owned by San Diego people and that the Pacific Co-Operatives League acted as trustee.

The Pacific Co-Operative League changed their form of organization to a profit corporation and made a great effort to trade its stock for "Loan Capital Certificate." In an endeavor to obtain the ownership of the stores in San Diego and elsewhere. When this effort failed, the creditors of the League very promptly filed an involuntary petition in bankruptcy against it, because the creditors knew that unless the League could obtain the ownership of the stores, it was bankrupt.

### **Loan Capital**

The "Loan Capital Certificates" stated that the

money was for the use of the San Diego stores, and was to be used in accordance with the By-Laws of the Pacific Co-Operative League.

The By-Laws state that the purpose of the League is to promote co-operation, aid local groups such as the San Diego Co-Operative Association, and to act as agents or trustees by keeping the books, furnishing managers, expert advice, et cetera.

They further go into detail as to how a local group may affiliate and provide for a return of the loan capital upon dissolution of the stores. We believe that the By-Laws alone would prove that the Pacific Co-Operative League did not own the San Diego stores. (Tr. pp. 70, 102.)

Counsel for appellant contend that all transactions between the Pacific Co-Operative League and the San Diego people were between the League and individuals. We have answered this in the opening part of our argument but wish to call special attention of this court to the fact that the By-Laws of the League constantly refer to groups and not individuals.

### **Interest on Loan Capital and Dividends**

Interest was paid on the loan capital only out of the earnings of the local stores in San Diego. Interest was never paid by the Pacific Co-Operative League, and the local stores never paid interest on the capital of any other local groups.



Dividends or rebates as they were called were paid only from the earnings of the San Diego stores. The payment of rebates and interest were determined by the local Board of Directors. The San Diego stores never shared in the profits of the Pacific Co-Operative League or any other local groups, neither did they pay any of the debts of the Pacific Co-Operative League or any other group. If the Pacific Co-Operative League borrowed the money for the stores, it should have paid the interest. (Testimony of Charles Henry Pelcher, Tr. p. 65; minutes of members' meeting of San Diego Association, February 17, 1921, Tr. pp. 80, 81; Tr. pp. 82-84; testimony of Stanley M. Gue, Tr. pp. 90, 91; testimony of Chas. J. Mays, Tr. pp. 92, 93; testimony of A. A. Johnson, Tr. pp. 108, 110; John S. Seibert, Tr. pp. 124, 125; testimony of H. H. Dobbs, Tr. pp. 141, 142.

### **Operation of Stores—Management**

We admit that the manager of the San Diego stores was furnished by the Pacific Co-Operative League, that he was bonded to the League, that the books were kept, that the receipts sent to, and the bills paid by the Pacific Co-Operative League out of the receipts of the San Diego stores for the benefit of the local Association in San Diego. As trustee of the local Association in San Diego, all of these things were proper and as represented by the By-Laws, literature, and personal representations. They do not, in any manner, prove that the ownership is in the League.

### **Deposit of Monies**

The fact that the monies were deposited to the credit of the Pacific Co-Operative League and checks on drafts paid by the League does not prove ownership. Banks, attorneys, trust companies, title companies and others accepting trusts are accepting monies of clients depositing them to their own account and disbursing funds by checks of the company or individual. Under the representations of the League, the funds were held in trust. (Petitioners' Exhibit No. 14, Tr. p. 98; Petitioners' Exhibit No. 12, Pacific Co-Operator, July, 1920, Tr. p. 99; testimony of Stanley M. Gue, Tr. p. 89).

### **Taxes, Insurance, Legal Title**

As trustees for the San Diego Co-Operative Association it was the duty of the Pacific Co-Operative League to take proper care of these matters. The members of the San Diego Association had confidence in the Pacific Co-Operative League or they would not have employed them as their trustees. Until the hearing of this matter, they had no knowledge of the facts that the stores were insured in the name of the Pacific Co-Operative League, that the taxes were paid in a like manner or that the notice of sale, and bill of sale were in the name of the Pacific Co-Operative League. The Pacific Co-Operative League violated its trust. Judge Bledsoe in his opinion, stated that, "Equity looks

to the substance not merely to the form.” (Testimony of H. A. Floaten, Tr. p. 135.)

### **Trusts**

Section 2222, Civil Code. How created as to trustee. Subject to the provisions of Sec. 852 a voluntary trust is created as to the trustee, by any words or acts of his indicating with reasonable certainty:

I. His acceptance of the trust or his acknowledgment, made upon sufficient consideration of its existence, and

II. The subject, purpose, and beneficiary of the trust.

Constituted by any acts or words of his indicating with reasonable certainty. acceptance of trust or acknowledgment upon sufficient consideration of its existence, purpose and beneficiary.

*Barker vs. Hurley*, 132 Cal. 21.

If a person has accepted the office either expressly or by implication, it is conclusive and he cannot afterwards by disclaimer or renunciation avoid its duties and responsibilities and the reason is that if the estate has once vested in the trustee it cannot be divested by a mere disclaimer or renunciation or can he convey the estate against the consent of the cestui que trust without committing a breach of trust, unless the instrument creating the trust gives him that power or unless there is a decree of a court to that effect.

*Drane v. Gunter*, 19 L. L. A. 331;  
*Strong v. Willis*, 3 F. L. A. 124;  
*Booth v. Oakland Bank of Savings*, 122 Cal.  
19, 24.

Words upon trust or trustee not necessary if creation of trust is otherwise sufficiently evident. Code relates to trust of personal property.

*Barker v. Hurley*, 132 Cal. 21, 28.

Trusts in personal estate are subject to no statutory restrictions and legislature has never attempted to define and enumerate the lawful creation of such trusts.

*In re Estate Hinckley*, 58 Cal. 457.

Written instrument not necessary to creation of trust in personal property.

*Helman v. McWilliams*, 70 Cal. 449, 452;  
*In re Estate Walkerley*, 108 Cal. 627;  
*Booth v. Oakland Bk. of Savings*, 122 Cal.  
19, 24.

Trust concerning personal property may be proved by parole.

*Silbey v. Hodgdon*, 52 Cal. 363, 367.

Whereupon a purchase of property, the conveyance of the legal title is taken in the name of one person or the consideration, or part of it, given or paid by another not in the way of a loan, to the grantee, the parties being strangers to each other, a resulting trust immediately arises from the transaction and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds. Vol. 1, Sec.

126, p. 185 of Perry on Trusts and Trustees, 6th Edition.

Resulting trusts: The plaintiffs furnished the defendant with money to purchase an interest in a mining corporation, with a verbal agreement that he should take a conveyance in his own name and transfer the same to the plaintiffs after a meeting of the company when demanded. Held that the conveyance to the defendant created an implied trust to the plaintiff's use arising by operation of law and as such not necessary to be created by writing under the Statute of Fraud.

*Bayles v. Baxter*, 22 Cal. 575.

Conveyance to a third party with or without consent of such vendees, without new or further consideration, creates a resulting trust in favor of vendee.

*Davis v. Baugh*, 59 Cal. 568.

Resulting trusts are fully recognized by the law and everyone is presumed to know the law.

*Murphy vs. Clayton*, 113 Cal. 153.

Where one person has acquired the legal title to property to which another has a better title and to whom it ought in equity and good conscience to go, equity will convert him into a trustee for such other person.

*Crosby v. Clark*, 132 Cal. 1.

Where one party has acquired the legal title to property to which another has the better right a court



of Equity will convert him into a trustee of the true owner and compel him to convey the legal title.

*Meader v. Norton*, 78 U. S. ((11 Wall.) 442.  
20 L. Ed. 184.

A court of Equity where it finds property in the hands of a person which is held in whole or part for the benefit of another, will under all proper circumstances impose upon the relation so existing, the character of a trust and declare interests of the several parties as they may appear.

*Butterfield v. Harris*, 20 Cal. Appl. 471.

Resulting trusts are not within the Statute of Frauds and may be proved by parole.

*Osborne v. Endicott*, 6 Cal. 149;  
*Millard v. Hathaway*, 27 Cal. 119;  
*Roberts v. Ware*, 40 Cal. 634-637;  
*Tripp v. Duane*, 74 Cal. 85;  
*Thomas v. Jameson*, 77 Cal. 91-93.

Considerable stress was laid on several points by the respondents' attorney in his argument before the Master. These points were: identification of trust fund; mingling of funds; identity of store and business; and change of materials or merchandise in such store. The following case deals with these points very thoroughly;

*Walter W. Byrne, et al, appellants, v. B. Mc-Grath, respondent*, 130 Cal. 316.

The subject matter of this trust is a drug store:  
(Page 320, second paragraph):

"The question of identity does not relate to the specific items of stock, fixtures, etc., con-

stituting the drug store at the time of the purchase but to the drug itself which is to be regarded collectively as a thing or entity, or, as it would be called in the civil law, a *universitas rerum* (Mackeldy's Roman Law, Secs. 159, 162) The material things belonging to the concern did not constitute the collective things or *universitas* spoken of as a drug store or business, but were only mutable and transitory parts of it. It was this that constituted the trust fund in question, which was something different from the material things momentarily constituting it and remained the same, through these, like the particles of water in a river were continually changing. At the time of the sale thereof it was (still) the identical property originally covered by the trust (*Orcutt v. Gould*, 117 Cal. 316)

\* \* \* The identity of a trust fund consisting of money (it is said in the case stated), may be preserved so long as it may be followed and distinguished from all other funds, not by identifying the individual pieces or coins, but by showing a separate and independent fund or value readily distinguishable from all other funds' and a fortiori is this true when the fund consists not of money, but of tangible and distinguishable items of property."

### **Estoppel**

We do not believe that the evidence shows that the stores were owned and controlled by the Pacific Co-Operative League from Sept. 11, 1920 until January, 1922, or at any other time. There is no evidence that the creditors of the Pacific Co-Operative League extended credit on the faith of the League's ownership of the San Diego stores. On the contrary there is evidence that credit was extended on the faith that the stores were owned by the San Diego people.

"My name is Walter G. Gastil. I am a wholesale grocery salesman employed by the Southwestern Grocery Company. I called on Mr. Huggins under the direction of our Credit Manager, and asked him where and by whom the bills would be paid and how often. Mr. Huggins stated the bills would be paid in San Diego; that they had a bank account down here, and that he would pay the bills each week. Mr. Huggins told me that the only connection between the local stores and Pacific Co-Operative League was for buying purposes." (Testimony of Walter G. Gastil, Tr. p. 97.)

"I do not know if any creditors of the local stores have filed claims in the Bankruptcy Court; several told me they had not, none told me that they had." (Testimony of Walter Huggins, Tr. pp. 96, 97.)

Other testimony on this subject is referred to under the heading "Creditors" in the argument.

There is no evidence that the local Board of Directors or the local Association had any knowledge that the Pacific Co-Operative League had violated its trust until December 1921, when the San Diego Association discharged the Pacific Co-Operative League as its trustee, appointed the directors of the San Diego Association to act as trustees in its stead and commenced an action in the Superior Court of San Diego County, California, asking for a dissolution of the trust and an accounting. (Minutes of meeting of San Diego Association December 15, 1921, Tr. p. 91.)

All of these things were done prior to the adjudication of the Pacific Co-Operative League or the Pacific Co-Operative Stores as bankrupt.

Counsel for appellant contend that by reason of the decree of the District Court the San Diego Association will take the stores free and clear of any claims whatsoever and that the creditors will be defrauded. That is not a fact, the San Diego stores owed about \$5,000.00 for merchandise purchased by said stores at the time this action was commenced. These creditors extended credit on the faith that the Pacific Co-Operative League did not own the stores but that the stores are owned by the San Diego people. If the stores are returned in accordance with the decree of the District Court these creditors will look to the stores for the amount due to them. They can immediately attach the stores which have a value in excess of the amount due them.

We contend that if the doctrine of Estoppel is ap-

plied in this matter, it should be applied against the Pacific Co-Operative League or its present successor the Trustee in Bankruptcy.

The evidence shows that the Pacific Co-Operative League represented that its purpose was to act as managers or trustees for local groups. These representations were made by the President of the League and other representatives at public meetings and through personal contact; they were made through various issues of the Pacific Co-Operator, the official organ of the League, its By-Laws and other literature. Representatives of the League placed a sign on the main store in San Diego stating that the store is owned by 500 families. This sign was over the store for a period of more than one year. The manager of the San Diego stores employed by the League represented to creditors of the stores that the only connection between the stores and the Pacific Co-Operative League was for buying purposes. Credit was extended on the faith that the San Diego stores were owned by the San Diego people. The Pacific Co-Operative League knew that the San Diego Association held regular meetings, that the store manager reported at these meetings, that the local Association in good faith believed that the stores were owned by its members. They addressed correspondence to the local Association, requested permission of it to pay certain expenses incurred by Mr. Ames in the interest of co-operation, referred such matters as the return of Loan Capital back to the local Association for action, allowed the local Association



to negotiate for the purchase of stores, to sign a written agreement for that purpose and to function as owners of the stores. We believe that under the circumstances it cannot be said that the Pacific Co-Operative League or its successors can now come into equity with clean hands. If it were decided that the stores in question are a part of the assets of the Pacific Co-Operative League, the creditors who extended credit to these stores would get only a very small portion of what is justly due to them. We believe that they and not the Trustee has a lien upon the stores, and that the doctrine of estoppel applies against rather than in favor of the Trustee in Bankruptcy.

### **Opinion of Judge Bean**

We do not believe it fair or just to cite this opinion unless this court is furnished with a transcript of the evidence showing the facts presented before the Special Master by both parties.

Judge Bean states in his opinion, "Now the principle contention of the defendants is, first, that the La Grande stores belonged to them, individually, and not to the Co-Operative League; but that is not supported by the testimony at all." The local people in the La Grande matter were the defendants.

The question is, what testimony was introduced by the La Grande people? Unless this court can review that testimony we contend that it is unfair to use the opinion against us in this hearing.

### **Agency**

Counsel for appellant contend that if an agent or trustee contracts personal debts, not for the benefit of the cestui que trust or the subject of the trust or outside of its duties and powers as trustee, the cestui que trust is liable for those debts of the trustee.

For example, a corporation engaged in the realty business represents various clients as trustee, managing stores, apartment houses or other enterprises. In the operation of its business, credit is extended to the corporation. Counsel for appellant contends that the property belonging to the clients of the real estate firm, trust funds in the bank et cetera are liable for the debts of the corporation if the clients have knowledge of the fact that the corporation is contracting debts. If that is the law or is equity every employer is liable for the personal debts of his agents, and all persons or firms doing business with banks, trust companies, real estate brokers and many other lines of business are liable for their debts.

Counsel for appellant also contends that because the funds of the San Diego stores were placed in the bank account of the Pacific Co-Operative League and commingled with the funds of the League and other groups, that they became the property of the League, that because bills of the local stores were paid by checks of the Pacific Co-Operative League, the League owned the stores.

### **Memorandum Opinion of Judge Bledsoe**

“Bledsoe, District Judge: With respect to the report of the Special Master in the above entitled matter having to do with the application of the San Diego Co-Operative Association for the delivery to it by the Receiver herein of three certain grocery stores situated in San Diego and the exceptions of the Receiver to such report, I have given the matter and the points presented in the comprehensive briefs of counsel, careful consideration. I can see no reason why the report of the Special Master should not be approved and confirmed.

It is true, of course, as claimed by the Receiver that the bankrupt was vested with and was actually engaged in the management of the three stores in question. It is equally true, however, and more to the point, that the members of the San Diego Co-Operative Association themselves put up the money which was actually used to purchase these three stores and I have no doubt but that they at all times in good faith felt that they were the owners and operators of the stores. Their Board of Directors sat in judgment on many of the problems presented and when not so concerned they were taking advantage of the supposedly expert advice and experience in co-operative work furnished them by the Pacific Co-Operative League. Because of their respective subscriptions and payments of real money to the Pacific Co-Operative League,

they acquired no interest or participation in any of the real or supposed general assets of the League. All of their interest, dividends and profits and all their participation in any subsequent "dissolution" was limited to the activities and property of the specific stores purchased with their money. The San Diego members of the League were interested in no stores other than their own; other members were not interested in their stores,

It is apparent from the constitution and by-laws of the League itself, that with respect to "associate members" such as the San Diego members were, they were to contribute distinct funds to be handled by the League but that such funds were for the purpose of organizing distinct League branches "that they may operate stores or enterprises." Such language would not have been used had it been intended that the stores or branches were to be the property of the League itself. So, also, the constitution provided that in order that the operation of such branch stores might be had, the Board of Directors of the League should order a survey of any proposed district to be made and decide the number of members and the capital required to operate such branch. The capital for such purpose was to be provided by a payment of each applicant for his associate membership in the League itself, which sum was not to be returned to him, to the amount of ten dollars and such additional amount as with the other payments from similar memberships in that locality

would provide the capital necessary to establish the branch in business.

It is provided and it was the actual experience of the San Diego Association that the interest at five per cent upon the so-called loan certificates, was paid out of the profits of the local stores at San Diego and the profits in addition upon purchases made therein by the holders of the loan certificates, were also paid out of profits of such stores.

When all else is said, it remains the fact that these stores were bought with money actually furnished by the members of the San Diego Co-Operative Association and it would require some definite and positive agreement, to which they were knowingly party, to hold that under such circumstances someone else was to become the owner and possessor of the properties purchased by them and with their money. The contract for the purchase of the three stores was made by them. It was never approved and accepted by the League, or at least a part of it never was approved, and in any event, it is apparent that the members of the Association themselves picked out the stores wanted, negotiated respecting the prices thereof, and they were responsible for the purchase thereof. The League merely held their money and offered them advice from time to time and provided them a Manager who was paid out of profits arising from the operation of their own stores, all in accordance with its declared purpose. That the actual bill of sale was made out to the League as



vendee and that other papers, indicative of ownership in it were executed without the actual knowledge of the members of the San Diego Association, does not change the legal situation. Equity looks to the substance not merely to the form.

I cannot accede to the view seemingly by Judge Bean of the District of Oregon, that as the League managed the stores therefore the League must have been and was the owner of the stores. If that were true, it would be a dangerous expedient for any purchaser or owner or possessor of property to employ someone to manage same for him.

If it be a fact that some members of the San Diego Co-Operative Association have parted with their so-called loan certificates and in return therefor have received stock or other certificates, that fact can have no influence here. The Association is entitled to these three stores. As to whom may be members of the Association and entitled to participate in the profits from or fund arising out of a dissolution of the stores, is another matter. If members of the Association shall have surrendered their loan certificates and in that wise, in equity or otherwise, surrendered or divested themselves of their interest or membership in the Association, then they have no right to participate in any profits accruing to the Association or to a division of any property belonging to the Association; and by the same token, if the Pacific Co-Operative League Stores is now possessed of such loan certificates, the Receiver

thereof will be entitled to make such use of them and enjoy such rights accruing from them as the individual owners thereof would had they remained in possession of them. Surrender of certificates by some would not change the legal rights inuring to the others.

Thirty exceptions were filed by the Receiver to the report of the Special Master. All of these exceptions are over-ruled and pursuant to Federal Equity Rule 67, there is hereby taxed as against the Receiver, the sum of five dollars for each of such exceptions so taken and over-ruled.

The report of the Special Master is confirmed and an appropriate order, directing the delivery of the property, as prayed for, will be entered. Counsel for the Association will prepare such order." Tr. pp. 148-153).

It is, therefore respectfully submitted that the decision of the Special Master and the District Court should be affirmed.

Respectfully submitted,

ELMER J. HERTEL,

MARCUS W. ROBBINS,

*Attorneys for Appellee.*

No. 4104.

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IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

---

G. W. Brainard, Trustee in Bankruptcy of the Pacific Co-operative League Stores Inc., a Corporation,

*Appellant,*

*vs.*

San Diego Co-operative Association,

*Appellee.*

---

PETITION FOR REHEARING.

---

W. T. CRAIG,

JOSEPH KIRK,

NORMAN A. BAILIE,

*Attorneys for Appellant.*



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---

**PETITION FOR REHEARING.**

Comes now G. W. Brainard, trustee in bankruptcy of the Pacific Co-operative League Stores Inc., a corporation, and respectfully petitions the court for a rehearing of the above entitled cause on the following grounds:

1. That no showing was made that appellee has any interest in the stores in question.

2. That at least fifty per cent. of the holders of loan capital certificates have exchanged them for stock in the Pacific Co-operative League Stores Inc.



3. That the appellee and the holders of loan capital certificates are estopped from claiming title as against the trustee in bankruptcy by their conduct in holding out the corporation to the world as the owner of the stores.

4. That as a creditor "holding a lien by legal or equitable proceedings" the trustee in bankruptcy has a right to said assets superior to appellee or the holders of loan capital certificates.

5. That credit was extended to the bankrupt corporation and its predecessor in interest by many firms throughout the state of California on the strength of the ownership of said stores.

## I.

The testimony all shows and the special master found [Tr. p. 29 & 46], that all subscriptions were made as individuals and not as an association, and there is neither evidence nor finding of any interest of the San Diego Co-operative Association in the litigation or in the stores. We contend that said association has no capacity to sue.

## II.

The evidence shows that at least four members of the board of directors of the local association had knowledge at all times that these stores were being held out to the world as the property of the Pacific Co-operative League Stores Inc., [Tr. p. 97, testimony of Walter Huggins; Tr. pp. 115-116 testimony of J. N. Bischoff; Tr. 120, testimony of Walter Barnes; Tr.

p. 123, testimony of John S. Seibert; Tr. p. 127, testimony of Nora White Simpson.]

### III.

The court in its opinion seems to have overlooked the fact that the Pacific Co-operative League has a great many creditors besides the San Diego creditors, and, that the result of the decision is to deprive these creditors of their rights in the premises. These stores all had signs on them which read, "San Diego Branch Pacific Co-operative League Store No. 1, Store No. 2, Store No. 3" respectively, thus proclaiming to the world that the stores were owned by the corporation and not by the local association. [Tr. p. 85.]

If the only creditors to be considered were the creditors of the San Diego stores there might be no great harm done by the court's ruling. But what of the creditors whose claims are general claims against this bankrupt concern such as H. A. Floatin with his four thousand (\$4,000.00) dollar claim [Tr. p. 134]? Surely these general creditors have some rights in the premises which the court is bound to protect as against these people who allowed the corporation to obtain credit on the faith of its ownership in these stores. Even the San Diego creditors were referred to San Francisco for credit information [testimony of C. O. Relstoff, Tr. p. 105]. The president of the local association at all times knew that the Pacific Co-operative League was operating a number of stores throughout the country [testimony of J. N. Bischoff, Tr. pp. 111, 112]. Money was borrowed by the corporation [testimony of H. H.

Dobbs, p. 138]. What is to become of the rights of these general creditors if the court's decision is allowed to stand?

It seems to appellant that there has been proven a clear case of estoppel against the subscribers to "loan capital," by their holding out the corporation, for a year and a half as the owner of these stores while creditors were advancing credit on the faith of such ownership.

#### IV.

The trustee stands in the position of a creditor holding a lien by legal or equitable proceedings. If any creditor could maintain an attachment or execution against these stores over the third party claim of the local association, then the trustee is entitled to the property. The San Diego creditors, by the court's own ruling, have such a right. But in what way are their rights superior to those of H. A. Floatin, or any other creditor? They are all general creditors of the Pacific Co-operative League [testimony Walter Huggins, pp. 96, 97]. All claims of San Diego creditors are against the Pacific Co-operative League.

There is no escaping the conclusion that if the decision of the court stands, the San Diego Co-operative Association, comprising presumably one-half of the subscribers of "loan capital" will get these stores free and clear and the creditors' rights will not be protected. They never sold the San Diego Co-operative Association any goods and are complete strangers to them.

Respectfully submitted,

W. T. CRAIG,

JOSEPH KIRK,

NORMAN A. BAILIE,

*Attorneys for Appellant.*



Due service of the within, and receipt of a copy thereof, is hereby admitted this. 21. day of April, A. D. 1924.

Marcus W. Robbins  
EJH

Elmer J. Hertel  
Attorneys for Appellee.











